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**Decisions of the
Comptroller General
of the United States**

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Preface

This pamphlet is one in a series of monthly pamphlets which will be consolidated on an annual basis and entitled *Decisions of the Comptroller General of the United States*. The annual volumes have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. Decisions are rendered to heads of departments and establishments and to disbursing and certifying officers pursuant to 31 U.S.C. 3529 (formerly 31 U.S.C. 74 and 82d). Decisions in connection with claims are issued in accordance with 31 U.S.C. 3702 (formerly 31 U.S.C. 71). In addition, decisions on the validity of contract awards, pursuant to the Competition In Contracting Act (31 U.S.C. 3554(e)(2) (Supp. III) (1985), are rendered to interested parties.

The decisions included in this pamphlet are presented in full text. Criteria applied in selecting decisions for publication include whether the decision represents the first time certain issues are considered by the Comptroller General when the issues are likely to be of widespread interest to the government or the private sector, whether the decision modifies, clarifies, or overrules the findings of prior published decisions, and whether the decision otherwise deals with a significant issue of continuing interest on which there has been no published decision for a period of years.

All decisions contained in this pamphlet are available in advance through the circulation of individual decision copies. Each pamphlet includes an index-digest and citation tables. The annual bound volume includes a cumulative index-digest and citation tables.

To further assist in the research of matters coming within the jurisdiction of the General Accounting Office, ten consolidated indexes to the published volumes have been compiled to date, the first being entitled "Index to the Published Decisions of the Accounting Officers of the United States, 1894-1929," the second and subsequent indexes being entitled "Index of the Published Decision of the Comptroller" and "Index Digest—Published Decisions of the Comptroller General of the United States," respectively. The second volume covered the period from July 1, 1929, through June 30, 1940. Subsequent volumes have been published at five-year intervals, the commencing date being October 1 (since 1976) to correspond with the fiscal year of the federal government.

Decisions appearing in this pamphlet and the annual bound volume should be cited by volume, page number, and date, e.g., 64 Comp. Gen. 10 (1987). Decisions of the Comptroller General that do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-230777, September 30, 1986.

Procurement law decisions issued since January 1, 1974 and Civilian Personnel Law decisions, whether or not included in these pamphlets, are also available from commercial computer timesharing services.

To further assist in research of Comptroller General decisions, the Office of the General Counsel at the General Accounting Office maintains a telephone research service at (202) 275-5028.

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B-236114, October 2, 1989

Procurement

Socio-Economic Policies

- Small businesses
- ■ Responsibility
- ■ ■ Competency certification
- ■ ■ ■ GAO review

The General Accounting Office will not question a contracting agency's determination that a small business concern is nonresponsible, or the agency's subsequent reassessment of new information regarding the concern's responsibility, where, following the agency's referral of the nonresponsibility determination to the Small Business Administration (SBA), the protester fails to apply to the SBA for a certificate of competency despite urging by the contracting agency that it do so.

Matter of: Commerce Funding Corporation

Commerce Funding Corporation (CFC), a small business, protests the award of a contract to any other bidder under invitation for bids (IFB) No. FCGE-89-B213-S, issued by the General Services Administration (GSA) as a Federal Supply Schedule procurement for microphotographic supplies. CFC objects that GSA's rejection of its low bid, on the ground that CFC was financially nonresponsible, was improper because the agency failed to make an "affirmative determination of nonresponsibility." In the alternative, the protester argues that, to the extent the agency did make a determination, it was arbitrary and capricious, and the agency effectively precluded the firm from appealing the determination by seeking a certificate of competency (COC) from the Small Business Administration (SBA).

We deny the protest.

GSA found CFC financially nonresponsible on the basis of financial information submitted by the firm in connection with a preaward survey. GSA based its determination on the grounds that the firm had inadequate working capital, debt equal to more than nine times the industry norm, a significant deficit in retained earnings, an operating loss for fiscal year 1988, and no established, available lines of credit with its banks. On May 24, 1989, the contracting officer found CFC nonresponsible and, since CFC is a small business concern, referred the matter to the SBA for possible issuance of a COC pursuant to the Small Business Act, 15 U.S.C. § 637(b)(7) (1988).

On June 5, the SBA requested CFC to provide information needed for review under the COC procedures by June 11; with the agreement of GSA, this dead-

line was later extended to June 13. CFC, however, chose instead to submit additional information to GSA, concerning a \$1 million dollar letter of credit, in an effort to persuade the agency to make an affirmative determination of responsibility; GSA established a deadline of June 21 or 22 for submission to the agency of any further information concerning CFC's financial responsibility. On June 23, the SBA closed its file on the COC referral due to CFC's failure to file a COC application. On the same date, after evaluating the letter of credit submitted by CFC, GSA concluded that the letter did not constitute new information that provided a basis for reversing its nonresponsibility determination. CFC thereupon filed this protest with our Office.

CFC first asserts that GSA never made an "affirmative determination of nonresponsibility," since the contracting officer, in a May 24 memorandum entitled "Finding and Determination of Non-Responsibility," stated that, based on the cited findings concerning CFC's financial status, "further investigation of [CFC's] financial capabilities would be deemed appropriate." According to the protester, that statement constituted an admission by the agency that it lacked sufficient information for a finding of nonresponsibility, and therefore rendered invalid the referral to the SBA.

We disagree. By referring the matter to the SBA, the contracting officer indicated that he was unable to make the affirmative determination of responsibility—including the determination that the contractor possesses or can obtain the necessary financial resources—required by Federal Acquisition Regulation (FAR) § 9.104-1.

Furthermore, once a nonresponsibility determination has been made and, as required by 15 U.S.C. § 637(b)(7), the matter has been referred to the SBA for consideration of issuance of a COC, it is incumbent upon the small business to file and complete an acceptable COC application in order to avail itself of the protection provided by statute against unreasonable or bad faith determinations of responsibility. *Belmont-Schick Inc.*, B-225100, Nov. 14, 1986, 86-2 CPD ¶ 562. Where the firm fails to meet this responsibility, we will not question the contracting officer's negative responsibility determination; such a review would, in effect, amount to a substitution of our Office for the SBA, the agency specifically authorized by statute to review these determinations. *Id.* Since the contracting officer made a nonresponsibility determination, referred the matter to the SBA and advised CFC of his actions, CFC's failure to file and complete a COC application precludes review of the determination.

CFC argues that in agreeing to consider additional information from the firm, GSA misled the protester into thinking that it did not have to pursue its remedies with the SBA until after that agency's deadline had passed. On the contrary, however, the record clearly indicates that GSA advised CFC on several occasions that there was no guarantee that GSA would reverse itself, and that the firm also should apply to the SBA for a COC.

CFC further argues that once having commenced a reexamination of CFC's financial responsibility after the May 24 nonresponsibility determination, GSA

was required to conduct the review in a reasonable manner. According to the protester, the review was prematurely terminated and therefore unreasonable. *See Marlow Services, Inc.*, 68 Comp. Gen. 390 (1989), 89-1 CPD ¶ 388; *Eagle Bob Tail Tractors, Inc.*, B-232346.2, Jan. 4, 1989, 89-1 CPD ¶ 5.

Again, however, CFC did not file and complete an acceptable COC application. In these circumstances, where a small business concern does not avail itself of the protection afforded by statute against arbitrary nonresponsibility determinations, and thereby precludes possible further development of the record and input into the matter by SBA, we believe that even to review only the reassessment of the new information would be inconsistent with the statutory scheme.

In any case, it appears that GSA reasonably reassessed the new information concerning the \$1 million dollar letter of credit, but found it insufficient to warrant reconsideration of the determination of nonresponsibility. In particular, the agency noted that financial statement for CFC, when read in conjunction with the statement for the Federal Funding Company (FFC), which issued the letter of credit, indicated that notes payable by CFC accounted for approximately 75 percent of FFC's assets, and that FFC's assets other than the notes payable by CFC were insufficient to cover the letter of credit. Although CFC argues that GSA should have sought further clarification, the agency had already provided CFC with several opportunities to provide information concerning its responsibility, and the agency was not required to delay award indefinitely. *See Cascade Leasing, Inc.*, B-231848.2, Jan. 10, 1989, 89-1 CPD ¶ 20.

The protest is denied.

B-235820, October 5, 1989

Procurement

Special Procurement Methods/Categories

■ Research/development contracts

■ ■ Contract awards

■ ■ ■ Foreign sources

Agency did not violate statutory prohibition against contracting with foreign corporations for research and development where proposal of United States firm, while found acceptable, was not evaluated as essentially equal from a technical standpoint to successful proposal of foreign firm.

Matter of: Survival Technology, Inc.

Survival Technology, Inc., protests the award of a contract to Duphar B.V. of the Netherlands under request for proposals (RFP) No. DAMD17-88-R-0115, issued by the U.S. Army Medical Research and Development Command for the development and initial production of diazepam autoinjectors and training devices. The protester contends that the agency's award of the contract to Duphar violates section 744 of the Defense Appropriations Act for Fiscal Year 1973, Pub. L. No. 92-570, 86 Stat. 1184, 1203 (1972), commonly known as the "Bayh

Amendment," and also violates 10 U.S.C. § 2507(b) (1988), known as the "Price Amendment." The two statutes generally restrict the Department of Defense from contracting with foreign firms under certain conditions.

We deny the protest.

The agency issued the RFP on August 19, 1988 for a cost-plus-award-fee contract for development of the autoinjector (used to administer diazepam to soldiers as a convulsant antidote for nerve agents), with a fixed-price option for low rate initial production. The solicitation provided for consideration of 6 technical factors, comprised of 24 subfactors, including management, organization, technical capability, personnel, advanced development and initial production facilities, corporate experience and regulatory affairs. The solicitation also provided for consideration of the options in evaluating proposals for award and stated that award would be made to that responsible offeror whose offer was evaluated as being most advantageous to the government after consideration of technical merit and cost. The solicitation also stated that estimated costs would receive less consideration than management expertise and technical merit, except in the case of two or more proposals deemed essentially equal in technical merit.

Three offerors submitted initial proposals on October 19, 1988, and after a period of negotiations, the agency invited the protester and the awardee to submit best and final offers on April 27, 1989. Although the agency found that the protester had submitted a technically acceptable proposal, its technical evaluation found the awardee's proposal superior in technical merit. For the research and development phases of the contract, the protester submitted a lower estimated cost, but the awardee's price for the production portion (fixed-priced options) of the contract was so much lower than the protester's offer for the same work, that the awardee's price was substantially lower overall. Based on the awardee's technical superiority and lower evaluated price, the agency awarded a contract to Duphar on June 1, 1989, this protest followed.

The protester argues that the award violates the Bayh Amendment, *supra*, which provides as follows:

None of the funds appropriated by this or any other Act shall be available for entering into any contract or agreement with any foreign corporation, organization, person, or other entity for the performance of research and development in connection with any weapon system or other military equipment for the Department of Defense when there is a United States corporation, organization, person, or other entity equally competent to carry out such research and development and willing to do so at a lower cost.

The protester does not challenge the agency's technical evaluation or the results of that evaluation which concluded that the awardee's proposal was superior in technical merit.¹ Rather, the protester argues that, as a capable American firm, it was "equally competent" within the meaning of the Bayh Amendment to perform the work and, since it submitted a lower price on the research

¹ In fact, the protester's proposal received 517 points less than the awardee's proposal (the maximum possible score was 4,560). Thus, the awardee's technical score exceeded the protester's score by approximately 11 percent. Moreover, the agency specifically found the awardee's proposal superior in numerous technical areas, including management, corporate experience, regulatory affairs, and organization, throughout the entire evaluation process.

and development portion of the contract, it was entitled to award. The protester contends that the term "equally competent" should be broadly interpreted. While the protester concedes that it was not the low offeror for the total basic and option requirements, it argues that "[b]y tacking on the production 'option' . . . the Army has attempted to defeat the purpose of the Bayh Amendment to protect the U.S. research and development industrial base." We do not agree.

The Department of Defense has implemented the Bayh Amendment by regulation which provides that the Bayh Amendment "does not change the rules for the selection of research and development contractors set forth in FAR [Federal Acquisition Regulation] Part 35." Department of Defense FAR Supplement, § 225.7007(b) (DAC 88-4). We have no basis to question this regulation. FAR generally prescribes traditional negotiation procedures and practices in selecting a contractor. Under such traditional negotiation selection procedures, two proposals are not "equal" unless the selection official, after evaluation of proposals on a basis consistent with the solicitation's stated scheme, reasonably determines that the technical proposals are essentially equal from a technical standpoint, in which case cost or price then becomes the determinative selection factor. See, e.g., *Sparta, Inc.*, B-228216, Jan. 15, 1988, 88-1 CPD ¶ 37. In this regard, the solicitation here explicitly provided that costs would only become determinative if "two or more proposals [were] deemed essentially equal." In the present case, the protester does not dispute that the agency reasonably found the two proposals not to be essentially equal from a technical standpoint under traditional selection rules. Accordingly, we see no basis to apply the restrictions of the Bayh Amendment which, in our view and under the regulation, restates traditional procurement rules.

We also note that, as stated above, the solicitation provided for consideration of the fixed-price option for low rate initial production and contemplated the making of one award for both research and development and initial production. Although the protester submitted a lower estimated cost for performing the research and development portion of the contract, the protester's total offer was substantially more than that of the awardee. Thus, award was made consistent with the terms of the solicitation.

The protester also claims that the award violates the Price Amendment, *supra*, which prohibits the use of appropriated funds for the procurement of chemical weapons antidote contained in automatic injectors determined to be critical under the Department of Defense Industrial Preparedness Program, unless manufactured in the United States by an "existing" producer under the Industrial Preparedness Program. The agency reports that inasmuch as the diazepam autoinjector has not yet been developed, the Army has as yet made no determination that the item is critical under the Industrial Preparedness Program. Although the protester argues that the diazepam autoinjector is part of a "family" of autoinjectors and that all other autoinjectors have been determined critical, we believe that the designation of an item as critical cannot be anticipated but is a prerequisite to coverage under the Price Amendment. There is in fact no "existing" producer for the diazepam autoinjectors; we also note that the award-

ee and the agency report that Duphar has the capability to produce the diazepam autoinjector in the United States if the Army ultimately determines to add the item to its critical items list.

The protest is denied.

B-235894, October 5, 1989

Procurement

Competitive Negotiation

■ **Contract awards**

■ ■ **Administrative discretion**

■ ■ ■ **Cost/technical tradeoffs**

■ ■ ■ ■ **Technical superiority**

Award to higher priced, higher technically rated offeror is not objectionable where the solicitation award criteria made technical considerations more important than price, and the agency reasonably concluded that the awardee's superior proposal provided the best overall value.

Procurement

Competitive Negotiation

■ **Technical evaluation boards**

■ ■ **Conflicts of interest**

■ ■ ■ **Corrective actions**

Contracting agency's action in convening a second technical evaluation panel was reasonable where the agency considered the chairperson of the first panel to have a potential appearance of conflict of interest because of the individual's prior working relationship with the chief executive officer of the protester.

Matter of: Louisiana Physicians for Quality Medical Care, Inc.

Louisiana Physicians for Quality Medical Care, Inc., protests the award of a contract to Louisiana Health Care Review, Inc., the incumbent contractor, under request for proposals (RFP) No. HCFA-89-006/PG, issued by the Health Care Financing Administration, Department of Health and Human Services. The RFP was issued for the operation of a peer review organization (PRO) for the state of Louisiana.¹ Louisiana Physicians essentially objects to the award because its offered price was lower than the awardee's. We deny the protest.

The RFP contemplated the award of a 3-year firm, fixed-priced contract with fixed unit rates per review category. The RFP stated that award would be made to the responsible offeror whose conforming offer is determined to be the most advantageous to the government in terms of technical merit, cost or price and other factors. The RFP stated that "paramount consideration" would be given to "technical merit/excellence" rather than to the proposed price. The RFP

¹ The PRO reviews both the quality and utilization of health care resources and services which are provided to Medicare beneficiaries.

listed the specific technical evaluation criteria and their corresponding point values. The evaluation criteria included review activities, health maintenance organization review, experience, personnel, and management plan. Although the RFP stated that proposed price will be considered independently of the technical criteria, the RFP contained a precise formula for the calculation of points for the price evaluation and for the total possible points that could be achieved, including the points for the price evaluation.

Two firms—the awardee and the protester—of 12 firms solicited submitted proposals in response to the RFP. The proposals were evaluated by two consecutively appointed evaluation panels. Only the scoring of the second panel was used in the award selection decision. After discussions and the evaluation of best and final offers (BAFOs), both proposals were determined to be technically acceptable with the following scores and prices:

| | Technical Points | Price |
|----------------------|------------------|--------------|
| Louisiana Health | 763.50 | \$14,182,877 |
| Louisiana Physicians | 573.25 | \$13,160,056 |

After applying the RFP price formula, the following scores (combined technical and price) resulted:

| | Total Points |
|----------------------|--------------|
| Louisiana Health | 1,040.50 |
| Louisiana Physicians | 873.25 |

Thus, evaluators gave Louisiana Health the higher technical score. Further, applying the formula contained in the RFP, Louisiana Health received the higher number of total points despite its slightly higher price. The Source Selection Authority recommended award to Louisiana Health based on the technical superiority of its proposal. Award was thereafter made to Louisiana Health.

In its protest, Louisiana Physicians objects to the award on the ground that its offered price was lower than the awardee's, and that its lower price should have been afforded greater weight in the evaluation.

In a negotiated procurement, the government is not required to make award to the firm offering the lowest cost unless the RFP specified that cost will be the determinative factor. *University of Dayton Research Inst.*, B-227115, Aug. 19, 1987, 87-2 CPD ¶ 178. We have upheld awards to higher rated offerors with significantly higher proposed costs, where it was determined that the cost premium was justified considering the significant technical superiority of the selected offeror's proposal. *Id.* In assessing the relative desirability of proposals and determining which offer should be accepted for award, the procuring agency has the discretion to select a more highly rated technical proposal if doing so is in the government's best interest and is consistent with the evaluation scheme set forth in the solicitation. *Comarco, Inc.*, B-225504, B-225504.2; Mar. 18, 1987, 87-1 CPD ¶ 305.

After reviewing the evaluation documents, we find that the agency's evaluation was reasonable and in conformance with the evaluation scheme set forth in the RFP. The record shows that the technical criteria represented over 80 percent of the total evaluation, while price represented approximately 20 percent.² Louisiana Health's proposal was evaluated as technically better than that of Louisiana Physicians. The evaluators found that Louisiana Health presented a well developed retrospective review plan and admission review plan. Louisiana Health's quality review plan was considered to have demonstrated a good understanding of the problem identification and quality intervention processes. Further, Louisiana Health's management plan provided a thorough description of how the organization would be directed toward accomplishing the RFP requirements.

On the other hand, the evaluators found Louisiana Physicians' management plan to be deficient in that it did not thoroughly describe the administrative controls, program coordination and direction of the resources in sufficient detail to demonstrate the organization's capability to accomplish all required tasks. Louisiana Physicians' interaction plan and quality intervention plans were also found deficient in that the protester did not fully demonstrate an understanding of these requirements. Moreover, Louisiana Physicians, in its protest, does not take exception to the technical evaluation of its proposal.

In our opinion, the technical evaluation was reasonable based upon the proposals submitted. The protester has not even attempted to show otherwise. Louisiana Physicians' proposal simply was not evaluated to be as good as Louisiana Health's proposal, and the agency reasonably determined that it would receive better services from Louisiana Health at the premium price. The award to Louisiana Health was consistent with the RFP scheme, which specifically stated that technical excellence would be the paramount consideration.

Concerning the evaluation, the protester also challenges the award of a 100 point bonus by the evaluation panel to Louisiana Health for qualifying as a physician sponsored organization.³ The protester contends that Louisiana Health was not a physician sponsored organization during the previous contract period and that Louisiana Health's method of recruiting physician participation for this requirement was wrought with confusion and misrepresentation.

As previously stated, we will examine an evaluation of proposals only to ensure that it was reasonable and consistent with the stated evaluation criteria. The RFP provided for 100 points to be given to an offeror who satisfactorily demonstrates that it qualifies as a physician sponsored organization. Both offerors were awarded the 100 points because the evaluation panel determined that both

² To the extent the protester argues that price should have been afforded greater weight, its protest is untimely. The RFP specifically revealed the relatively low value to be given the price factor. Protests of apparent alleged solicitation defects must be protested prior to the closing date for receipt of proposals, and Louisiana Physicians did not protest until after award. See 4 C.F.R. § 21.2(a)(2) (1989); *Schuelke & Assocs., Inc.*, B-231389, Sept. 2, 1988, 88-2 CPD ¶ 210.

³ The agency's regulation, 42 C.F.R. § 462.102 (1988), defines a physician sponsored organization as one composed of a substantial number of the licensed doctors of medicine and osteopathy practicing medicine or surgery in the review area and who are representative of the physicians practicing in the area.

offerors met the applicable requirements. In making this determination, the panel relied on the representations in the offerors' proposals with respect to the number of physician members claimed. The agency states that the mechanisms used by both offerors to enroll physician members were acceptable and that they had no reason to question their validity. We have no basis to object to the agency evaluation in this regard.

Louisiana Physicians next argues that the agency's convening of a second panel to evaluate proposals was inappropriate and prevented accurate evaluation of the proposals. The agency responds that the technical proposals were initially sent to the Office of Peer Review for evaluation by a panel composed of the Project Officer and a nurse reviewer from the Dallas Regional Office as well as two other members of the central office. The agency subsequently became concerned over a potential appearance of conflict of interest between the chairperson of the panel (a non-voting member) and the chief executive officer of Louisiana Physicians, since both had worked together in the Dallas Regional Office for several years. Consequently, the agency decided to convene a new panel to evaluate the proposals. The second panel consisted of three program analysts from the program's central office in Baltimore, Maryland, and one representative from Region II in New York.

While the protester contends that there were no allegations that any of the voting members of the initial panel had any bias, the procuring agency bears the responsibility for balancing the competing interests of the procurement process between preventing possible bias and awarding a contract that is most advantageous to the government. *See NAHB Research Found., Inc.*, B-219344, Aug. 29, 1985, 85-2 CPD ¶ 248. We will not disturb the agency's determination in such a matter unless it is shown to be unreasonable. *Id.* In view of the potential appearance of conflict of interest that existed with respect to the chairperson of the first panel, although not a voting panel member, we believe that the agency's action in convening a new panel has not been shown to be unreasonable.

The protester also argues that the second technical evaluation panel lacked knowledge of Louisiana Health's history of unsatisfactory performance under the previous contract. The protester contends that the original panel knew of Louisiana Health's past history of deficiencies and that Louisiana Health's inability to perform under the prior contract should have been considered by the second panel.

The record indicates that both the first and second panels were aware of Louisiana Health's prior performance, but did not conclude that it warranted the downgrading of Louisiana Health's technical proposal. In this regard, Louisiana Health denies that its performance was unsatisfactory in view of the significant backlog of cases that the firm inherited from the preceding contractor.

To the extent that Louisiana Physicians' protest challenges Louisiana Health's ability and capacity to perform, it involves the issue of Louisiana Health's responsibility. Our Office will not review protests against affirmative determina-

tions of responsibility unless either possible fraud or bad faith on the part of procuring officials is shown or the solicitation contains definitive responsibility criteria which allegedly have been misapplied. 4 C.F.R. § 21.3(m)(5); *Yale Materials Handling Corp.—Reconsideration*, B-226985.2 *et al.*, June 17, 1987, 87-1 CPD ¶ 607. Here, the agency determined that Louisiana Health was a qualified source that possessed the technical ability to perform and was financially capable. In this regard, an offeror's prior performance is only one of several relevant factors that should be considered by the agency when reviewing a prospective contractor's responsibility. See FAR § 9.104-1 (FAC 84-18); *C.W. Girard, C.M.*, 64 Comp. Gen. 175 (1984), 84-2 CPD ¶ 704. Again, an affirmative determination of responsibility, made after consideration of prior performance, is not reviewable by this Office, except under circumstances not shown here.

The protest is denied.

B-236239.2, October 6, 1989

Procurement

Specifications

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Sureties
- ■ ■ ■ Financial information

Solicitation provision which requires offerors providing individual sureties to submit a certified public accountant's certified balance sheet(s) and income statement(s) with a signed opinion for each surety is not legally objectionable as unduly restrictive of competition where the accuracy of sureties' net worths is often called into question by offerors' failure to submit sufficient supporting information.

Matter of: Consolidated Industrial Skills Corporation

Consolidated Industrial Skills Corporation protests the provision in request for proposals (RFP) No. N62467-89-R-0516, issued by the Department of the Navy, which requires those offerors who provide individual sureties to submit a certified public accountant's (CPA's) audited financial statement evidencing each surety's net worth. The solicitation is for base maintenance and utilities operation at the Naval Station Complex in Mayport, Florida. Consolidated contends that this requirement effectively eliminates individual sureties as a viable means of obtaining bonding and as such is unduly restrictive of competition.

We deny the protest.

The solicitation, issued as a small business set-aside, requires a performance bond and a payment bond. In this regard, the RFP contains an "Individual Surety Clause" which states that in order for the contracting officer to determine the acceptability of individuals proposed as sureties, all offerors providing bonds which are executed by individual sureties are required to submit, after

receipt of information in support of Standard Form (SF 28), "Affidavit of Individual Surety":

- (1) A complete description of property offered, supported by title or deed, and appraisal or tax assessment;
- (2) A current list of all other bonds on which the individual is a surety and bonds for which the individual is requesting to be a surety;
- (3) Independent certification of net value of property offered;
- (4) Independent certification of liens or other encumbrances which exist against all property listed;
- (5) CPA-certified balance sheet(s) and income statement(s) with a signed opinion for each individual surety.

It is the last requirement to which the protester objects.

Consolidated contends that the requirement to provide a CPA audited income statement and balance sheet and a signed unqualified opinion for each individual surety is excessive and unreasonable. The protester contends that this requirement is not in accordance with either Federal Acquisition Regulation (FAR) § 28.202-2 (FAC 84-42) or the instructions in the SF 28.

Consolidated alleges that this requirement is so onerous that it effectively eliminates the opportunity to use individual sureties. In support of its allegation, Consolidated has submitted letters from two CPAs in which they state that they have never prepared an audited personal financial statement, but "routinely" or on "numerous" occasions have prepared "compiled" personal financial statements. The difference between an audited financial statement and a compiled one is that the information contained in the latter is supplied by the individual surety and is not independently verified or attested to by the CPA.

A contracting officer, pursuant to FAR § 28.202-2, is obligated to "determine the acceptability of individuals proposed as sureties." Since the regulation states that the information provided in the SF 28 is "helpful" in determining the net worth of proposed individual sureties, we have consistently held that the contracting officer is therefore not limited to the consideration of information contained in the SF 28, but may go beyond that information when necessary in making the decision. *Hughes & Hughes*, B-235723, Sept. 6, 1989, 89-2 CPD ¶ 218.

The determination of the acceptability of an individual surety is a factor in determining responsibility and a question of business judgment, and as such the contracting officer is vested with a wide degree of discretion in making this determination. *Id.* In general, therefore, the contracting officer may decide what specific financial qualifications and information to consider in determining the individual surety's responsibility. *Southern California Eng'g Co., Inc.*, B-234515.2, Aug. 21, 1989, 89-2 CPD ¶ 156. A contracting officer, however, does not have unfettered discretion to decide what is necessary to establish an individual surety's acceptability. For example, we have held that a blanket require-

ment that all individual sureties provide a primary security interest in real property listed on an SF 28, as well as proof of title and appraisal of value, was not reasonably related to the minimum needs of the agency, and was therefore overly restrictive. *Altex Enters., Inc.*, 67 Comp. Gen. 184 (1988), 88-1 CPD ¶ 7. We stated that the requirement of a primary security interest effectively prohibited the use of individual sureties, without a demonstrated need to do so in the particular procurement, which we indicated was inconsistent with FAR § 28.202-2, which expressly permits the use of individual sureties. There is a balance to be drawn, therefore, between a bidder's right to use individual sureties and a contracting agency's need to reasonably assure itself of the acceptability of the individual sureties proposed.

We do not find that requiring a CPA audited financial statement is an overly restrictive requirement which effectively prohibits the use of individual sureties. The contracting officer noted that her experience with SF 28 Affidavits of Individual Sureties has demonstrated that people signing the certificate of sufficiency do not understand what they are signing and do not have personal knowledge of the surety's net worth. The Navy states that since SF 28s are less than reliable, it seeks a certified CPA opinion in order to obtain an unbiased, professional opinion of the surety's net worth.

We have consistently upheld contracting agency's nonresponsibility determinations where the SF 28 contents created doubt as to the true net worth of an individual surety, and the bidder or offeror failed to supply an audited financial statement. *Hughes & Hughes*, B-235723, *supra*. A review of our cases shows that the crux of the problem is that the manner in which individual sureties complete the SF 28 often leaves the agency in doubt as to the validity of the surety's self-stated net worth.¹ In these cases we have recognized that financial statements "compiled" by a CPA and based on information provided by the surety are of limited value in determining the surety's net worth. *Id.* Although it may be, as the protester states, that "few individuals have their net worth audited," we think that when one decides to engage in the business of being an individual surety—and it is a business—one should be prepared to provide an independent verification of the net worth claimed. Although the cited cases are distinguishable from the present circumstance in that in those cases it was only after the contracting agency received the SF 28 that it requested additional information, we do not find it legally objectionable that here the Navy advised offerors through its solicitation and in advance of submitting a proposal that a CPA's audit of the individual sureties would later be required.

The protest is denied.

¹ See, e.g., *Ram II General Contractor, Inc.*, B-234613, June 7, 1989, 89-1 CPD ¶ 532; *Construct Sun, Inc.*, B-234068, May 8, 1989, 89-1 CPD ¶ 431; *J & J Eng'g, Inc.*, B-233463.2, Feb. 13, 1989, 89-1 CPD ¶ 147; *Labco Constr., Inc.*, B-232986 *et al.*, Feb. 9, 1989, 89-1 CPD ¶ 135; *Jerry Eaton, Inc.*, B-233458, Jan. 24, 1989, 89-1 CPD ¶ 71; *Cascade Leasing, Inc.*, B-231848.2, Jan. 10, 1989, 89-1 CPD ¶ 20.

B-232357, October 10, 1989

Appropriations/Financial Management

Claims Against Government

■ Unauthorized contracts

■ ■ Quantum meruit/valebant doctrine

Procurement

Payment/Discharge

■ Unauthorized contracts

■ ■ Quantum meruit/valebant doctrine

A claim against the Army, arising from its continued use of rental automated data processing equipment and services for nearly a year after the applicable contract had expired, may be paid on a *quantum meruit/quantum valebant* basis. However, since the equipment and services at issue could have been procured under a non-mandatory General Services Administration (GSA) Federal Supply Schedule, the amount of the claim is reduced to that which would have been paid had the items been properly procured under the relevant schedule.

Matter of: Mohawk Data Science Corporation

The Department of the Army has asked whether it may pay the claim of Mohawk Data Science Corporation for the rental of automated data processing equipment which the Army continued to use for nearly a year after its contract with Mohawk had expired. Army's doubt concerning its ability to pay Mohawk Data Science Corporation stems from the absence of a formal, written contract between Army and Mohawk for the equipment rental during the period in question. We conclude that Mohawk's claim should be paid on a *quantum meruit* and *quantum valebant* basis. However, we also conclude that the Army may not pay Mohawk more than it would otherwise have paid for rental of the equipment used, had Army procured those services, using the A's Federal Supply Schedule. Since the amount invoiced by Mohawk exceeds that amount, the claim is reduced accordingly.

Background

Beginning in 1976, the Army Office of Procurement, Letterkenny Army Depot (LEAD), Chambersburg, Pennsylvania, was tasked to procure automated data processing equipment for the headquarters offices of the Army Material Research and Development Command (AMRDC), in Alexandria, Virginia. Originally, LEAD carried out that assignment by leasing the equipment from Mohawk Data Science Corporation¹ pursuant to a GSA Federal Supply Schedule, which GSA has informally advised us was (and still is) "non-mandatory," rather than "mandatory," in nature. For the next 12 years (ending with a contract covering the year from October 1985 through September 1986), LEAD renewed, on an annual basis, its contract with Mohawk.

¹ Mohawk was recently taken over by Momentum Systems Corporation, which was itself taken over by Decision Data, Inc. For purposes of *simpliciter*, this decision refers to the claimant as Mohawk.

Sometime after LEAD renewed Mohawk's contract for fiscal year 1986, the Army instructed LEAD that it would not be responsible for this assignment in the future. However, the Army informed neither AMRDC nor Mohawk of this change. When the fiscal 1986 contract period ended, AMRDC assumed that LEAD would see to the renewal of Mohawk's contract and accordingly continued to use Mohawk's equipment. Mohawk also apparently assumed that LEAD was still responsible for contract renewal, and attempted to contact LEAD to obtain a renewal contract. In February 1987, Mohawk (anxious about the continued absence of a written agreement to cover fiscal year 1987) contacted AMRDC to discover the reason for the delay in forwarding a renewal contract. In June 1987, Mohawk and AMRDC finally established that LEAD was no longer responsible for procuring AMRDC's automated data processing equipment. According to the submission, during this period, and through the end of August 1987, AMRDC continued to use Mohawk's equipment. On September 1, 1987, AMRDC discontinued its use of the Mohawk equipment, and formally requested Mohawk to remove it.

Although AMRDC agrees with Mohawk that the government received and accepted the use and benefit of this equipment during fiscal year 1987, and it presently has sufficient funds with which to pay for it, AMRDC is uncertain of the proper amount to pay Mohawk, as well as its legal authority to make *any* payment. AMRDC's doubts regarding how much to pay derive from two facts. First, Mohawk has submitted invoices to AMRDC totalling \$53,586.21, which exceed both the amount charged by Mohawk for rental of its equipment during fiscal 1986 (\$29,505.96), and the amount for which AMRDC could have obtained this same equipment from Mohawk during fiscal year 1987 under the relevant Federal Supply Schedule (\$40,634.52) had AMRDC actually attempted to procure it.² Second, there was no express contract in effect between the government and Mohawk during the period in question, and that omission cannot be remedied by resort to the theory of ratification. See e.g., 64 Comp. Gen. 727 (1985). For this reason, AMRDC suggests that this Office consider approving payment to Mohawk under the principles of *quantum meruit* and *quantum valebant*.

Discussion

This Office has long held that the principles of *quantum meruit* and *quantum valebant* authorize reimbursement to a firm whose performance has benefitted the government—even though the government did not have an enforceable contract with the firm. E.g., 64 Comp. Gen. 727 (1985); 63 Comp. Gen. 579, 584 (1984). The criteria for payment under these equitable principles normally include four elements. *Id.* See also B-226433-O.M., April 15, 1987. First, there must be a threshold determination that the goods or services for which payment is sought would have been a permissible procurement, had the proper proce-

² AMRDC's initial submission stated that the invoiced amounts follow the Federal Supply Schedule prices in effect during fiscal year 1987, and "represent the reasonable value of the benefit received by these GSA schedule items." However, AMRDC has subsequently advised us, both formally and informally, that it no longer stands behind that assertion.

dures been followed. Second, the government must have received and accepted a benefit. Third, the firm must have acted in good faith. And fourth, the amount to be paid must not exceed the reasonable value of the benefit received.

Based on the submission, we can easily conclude that the first three of these elements have been satisfied here. First, there is no question that AMRDC could have permissibly contracted for Mohawk's automated data processing equipment rental and maintenance services for fiscal 1987, had the proper procedures been followed (as had in fact been the case for the preceding 12 years). Second, the Army admits that AMRDC had the use and benefit of those services from October 1986 through August 31, 1987. Third, there are sufficient grounds to conclude that Mohawk acted in good faith. For example, Mohawk had been providing these services to AMRDC for the preceding 12 years. The provision of these services to AMRDC in fiscal year 1987 simply constituted a continuation of that relationship, and it was the lack of co-ordination within the Army that gave rise to the failure to contract for the use of the equipment in fiscal year 1987. *Cf.* B-226433-O.M., April 15, 1987.

The fourth element required for a *quantum meruit* or *quantum valebant* payment is that the amount to be paid represents the reasonable value of the benefit received. In a number of previous cases, we have held that where the goods or services at issue were *required* to be purchased under a "mandatory" GSA Federal Supply Schedule, *quantum meruit/quantum valebant* payments may not exceed the schedule prices. *E.g.*, 63 Comp. Gen. 579 (1984). The issue here is whether the same would be true where—as here—the schedule was "non-mandatory" or discretionary in nature.

To understand this aspect of the problem, it is necessary to know a little about the nature and origin of GSA's Federal Supply Schedules. GSA enters into requirements contracts for items commonly used by government agencies. Those contractors and their goods and services are then listed on GSA's Federal Supply Schedules. *See* Federal Property Management Regulations, 41 C.F.R. Subpt. 101-26.4 (1988). The contracts and schedules specify whether agencies are required (mandatory schedules) or merely permitted (non-mandatory schedules) to purchase the items included from the contractors listed on particular schedules. 41 C.F.R. § 101-26.401-1. Where the items at issue are contained in a non-mandatory schedule, the decision whether to purchase an item from a contractor included on the schedule or to proceed with a new solicitation is a business judgment committed to the discretion of the contracting officer, and will not be questioned absent a clear showing of abuse of discretion. B-210490, Feb. 7, 1983, 83-1 CPD ¶ 135. For mandatory schedules, however, contracting officers generally have no real discretion on whether or not to use the schedules. *See* 41 C.F.R. §§ 101-26.401-1 through 101-26.401-5 (1988). *Cf.*, *e.g.*, B-228302, Jan. 13, 1988 (urgent or small requirements); B-141880-O.M., Feb. 12, 1960 (exigent circumstances required immediate delivery to a remote location which could not have been accomplished under the relevant schedule). For this reason, this Office has previously held that purchasing officers have no legal authority to obligate the government to pay more for an item than the amount for which it could have

been purchased under a mandatory Federal Supply Schedule. *E.g.*, 30 Comp. Gen. 23, 24 (1950). That being the case, we have also held that there is no legal authority for a *quantum meruit/quantum valebant* payment to exceed the price that would have been paid, had the item been properly purchased under a mandatory schedule. 30 Comp. Gen. 23, 24 (1950); 26 Comp. Gen. 866 (1947).

Although our reasoning is somewhat different, our conclusion is the same where the items at issue could have been purchased under a non-mandatory schedule. The principles of *quantum meruit* and *quantum valebant* exist to provide an equitable basis upon which to make a payment where, through administrative error, no express contract was created. In keeping with the equitable basis for such payments, the amount to be paid is usually determined by reference to the fair or reasonable value of the benefits received. We can think of no more appropriate method by which to determine the reasonable value of a particular good or service than to refer to the prices which emerge from a competitive procurement for the same item or type of items—which is how the Federal Supply Schedule contract prices are derived. B-232660, Jan. 10, 1989, *citing* the Competition in Contracting Act, 41 U.S.C. § 259(3) (Supp. IV 1986); Federal Acquisition Regulation, § 6.102(d)(3). In essence, the operation of this limitation upon *quantum meruit/quantum valebant* payments simply recognizes the fact that the prices derived under the Federal Supply Schedules are, by definition, fair and reasonable.

The truth of this proposition becomes particularly clear when the firm seeking payment actually participated in the Federal Supply Schedule competitive procurement and was rewarded with a listing on the relevant schedule, as is precisely the case before us now. Mohawk did in fact bid for awards under the relevant schedule and succeeded in gaining a place on the schedule. We can conceive of no sound reason why the government should pay Mohawk more than the price that it would have received had the proper procedures been followed to purchase the identical items from the same company under the relevant Federal Supply Schedule.

Conclusions

Mohawk's claim for reimbursement for AMRDC's use of its automated data processing equipment and services from October 1, 1986 through the end of August 1987 satisfies the requirements for payment under the principles of *quantum meruit/quantum valebant*. However, since the equipment and services at issue could have been procured under a non-mandatory GSA Federal Supply Schedule, the amount of the claim is reduced to that which would have been paid had the items been properly procured under the relevant schedule. The schedule's annual rate should be prorated to the period of AMRDC's actual use of and benefit from those items. The voucher submitted is hereby returned for appropriate action by the Army.

Civilian Personnel

Compensation

- Labor standards
- ■ Exemptions
- ■ ■ Administrative determination
- ■ ■ ■ GAO review

Pursuant to 4 C.F.R. Part 22, an agency and a union jointly request a determination from the Comptroller General on the exempt/nonexempt status for overtime compensation under the Fair Labor Standards Act (FLSA) of a grade GS-12 Audio Visual Production Officer. Since the Office of Personnel Management has the authority to administer the FLSA under 29 U.S.C. § 204(f) (1982) for federal employees, including the authority to make final determinations as to whether employees are covered by its various provisions, the General Accounting Office will not consider overtime claims under FLSA where the employee's position has been classified by OPM as exempt. Appeals of classification status should be directed to OPM.

Civilian Personnel

Compensation

- Overtime
- ■ Claims
- ■ ■ Statutes of limitation

The fact that an employee's grievance concerning overtime pay was untimely filed under the terms of a collective bargaining agreement does not preclude consideration of his claim for such pay by the General Accounting Office provided it is filed within the 6 years prescribed in 31 U.S.C. § 3702.

Civilian Personnel

Compensation

- Overtime
- ■ Eligibility
- ■ ■ Travel time

Entitlement to overtime compensation by federal employees while in a travel status under 5 U.S.C. § 5542(b)(2)(B)(iv) requires that travel result from an event which could not be scheduled or controlled administratively. Travel performed by an employee to attend an event scheduled and conducted by the employee's agency clearly does not meet this requirement, and the employee may not be paid overtime compensation for that travel.

Matter of: Morris Norris—Claim for Overtime Compensation

This decision is in response to a joint request pursuant to the labor-management relations procedures set forth in 4 C.F.R. Part 22 (1988) from the Department of the Army (Army), Headquarters United States Army Infantry Center, Fort Benning, Georgia, and the American Federation of Government Employees (AFGE), Local 54. The parties request a decision as to whether Mr. Morris Norris, a grade GS-1071-12 Audio Visual Production Officer employed by the Army at Fort Benning, and classified as exempt from the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* (1982), is entitled to overtime compensation

under either 5 U.S.C. § 5542 (1982) or the FLSA. We hold that, in the circumstances presented here, Mr. Norris is not entitled to overtime compensation.

Background

Mr. Norris was directed to perform temporary duty at Yakima, Washington, during May 11-17, 1987, and then again during October 1-17, 1987. His work involved the filming of exercises conducted by the Army. Mr. Norris filed claims for overtime based upon each trip. The agency denied a total of 27.75 hours of claimed overtime for both trips. Those hours represented overtime claimed by Mr. Norris for in-flight time, weekend travel, travel to the airport and check-in for flights, missed lunch hours, and travel to the worksite at the start of the day.

On December 9, 1987, Mr. Norris filed a grievance pursuant to the negotiated grievance procedure in which he requested to be paid for the unpaid hours. The grievance was denied through the fourth step. The AFGE requested appointment of an arbitrator. On the day prior to the scheduled arbitration, the parties agreed upon a settlement whereby the following issues would be submitted to the Comptroller General for an opinion:

1. Does the fact that the grievance concerning overtime resulting from the May trip was filed untimely under the collective bargaining agreement between the AFGE and the Army bar our Office from considering the May overtime claims?
2. Is the position of Audio Visual Production Officer, grade GS-1071-12, occupied by Mr. Norris, properly classified as exempt from the FLSA? If not, may the overtime claims be paid under the provisions of the FLSA?
3. Are Mr. Norris's claims for overtime payable under the provisions of title 5 of the United States Code?

Opinion

Timeliness Limitation

The Army objects to consideration by our Office of overtime compensation resulting from Mr. Norris's May trip as it claims Mr. Norris's grievance was filed untimely under the collective bargaining agreement. A limitation period incorporated in a collective bargaining agreement not based upon a statute or regulation binding on our Office does not serve as a bar to a review by our Office of the underlying substantive issues raised. The limitation controlling our Office is the 6-year period contained in 31 U.S.C. § 3702 (1982). Since the claim for overtime was filed with our Office within that 6-year period, it is not time-barred.

Exemption of Coverage Under FLSA

In addition to overtime provisions applicable to federal employees set forth in title 5 of the United States Code, the federal government in its status as an employer is subject to provisions of the FLSA.¹ However, certain employees are exempted from coverage under the FLSA, including "administrative employees" whose positions meet certain requirements. See 29 U.S.C. § 213(a)(1) and 5 C.F.R. § 551.205 (1986). We have been informally advised by the Office of Personnel Management (OPM) that it has classified the position of Audio Visual Production Officer (Code 1071) as exempt under the FLSA since employees in that position are such "administrative employees."

Under 29 U.S.C. § 204(f), OPM is authorized to administer the FLSA with respect to federal employees. We have consistently declined to review OPM's determinations as to an employee's exempt or nonexempt status. See *International Association of Firefighters, Local F-48*, B-226136, July 13, 1987, and cases cited. Accordingly, we will not consider Mr. Norris's claims under the FLSA. Any question concerning the propriety of the exempt classification should be directed to OPM.

Title 5 Overtime

The general rule regarding overtime pay is that employees may not be compensated for time spent on official travel outside their scheduled duty hours. See 5 U.S.C. § 5542; 55 Comp. Gen. 629, 632 (1976). Under the provisions of 5 U.S.C. § 5542(b)(2)(B), time spent in a travel status away from an employee's official duty station may be hours of employment only if the travel (a) involves the performance of work while traveling, (b) is incident to travel that involves the performance of work while traveling, (c) is carried out under arduous conditions, or (d) results from an event which could not be scheduled or controlled administratively, including travel by an employee to or from such an event.

Mr. Norris first claims overtime on the basis that his travel involved the performance of work while traveling. Travel which involves the performance of work while traveling generally means work which can only be performed while traveling or work which an agency requires an employee to perform while traveling. See Federal Personnel Manual Supplement 990.2, Subchapter S1-3.

The hours claimed by Mr. Norris for the check-in for flights and the in-flight time did not involve the performance of work while traveling contemplated by the statute. The record indicates that Mr. Norris was directed to have accompanying military personnel handle the government equipment during the trips. He was not required to ensure the physical integrity of the equipment transported at each step of the travel. Also, although Mr. Norris claims he spent his traveltime reading and familiarizing himself with scripts, such activities could have been performed while not traveling, and he was not ordered by the agency to perform such activities while traveling. Finally, there is no authority to com-

¹ See 29 U.S.C. §§ 203(d), (e) and (x).

pensate Mr. Norris for the hours he has claimed for weekend travel, travel to the airport and to the worksite at the start of the day, or for missed lunch hours due to travel, since he was not actually performing work during those periods.

Mr. Norris also contends that his overtime claims were based upon travel which resulted from an event which could not be scheduled or controlled administratively. For an event to qualify as administratively uncontrollable under 5 U.S.C. § 5542(b)(2)(B)(iv), there must be a total lack of government control. 51 Comp. Gen. 727 (1972); *Hankins and Archie*, B-210065, Apr. 2, 1984; *Mark Burstein*, B-172671, Mar. 8, 1977; *Barth and Levine v. United States*, 568 F.2d 1329 (Ct. Cl. 1978). Here, Mr. Norris attended and filmed events which were scheduled and conducted by and under the total control of the Department of the Army, his employing agency. This clearly precludes a finding of lack of government control, and thus the travel does not fall within the exception authorized by 5 U.S.C. § 5542(b)(2)(B)(iv).

Mr. Norris's requests for overtime compensation are denied accordingly.

B-236016, October 10, 1989

Procurement

Socio-Economic Policies

- Small businesses
- ■ Preferred products/services
- ■ ■ Certification

Requirement that bidder under a small business set-aside procurement for supplies perform at least 50 percent of the cost of manufacturing the supplies is a material term of the solicitation and bid which took exception to that requirement by indicating that 100 percent of manufacturing would be subcontracted thus properly was rejected as nonresponsive.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

To the extent that protester contends that Small Business Administration (SBA) regulation in effect superseded provision in invitation for bids (IFB) requiring that bidder perform at least 50 percent of the cost of manufacturing the supplies called for by the IFB, protester was required to raise the issue before bid opening, since inconsistency between SBA regulation and IFB provision was apparent from the IFB.

Matter of: Vanderbilt Shirt Company

Vanderbilt Shirt Company protests the rejection of its bid and the subsequent award of a contract to Tennier Industries, Inc., under invitation for bids (IFB)

No. DLA100-89-B-0212, issued by the Defense Logistics Agency for snow parkas.

We deny the protest.

The IFB was issued on March 10, 1989 as a total small business set-aside. The solicitation contained Federal Acquisition Regulation § 52.219-14, entitled "Limitations on Subcontracting," a clause which implements the Small Business Act, 15 U.S.C. § 644(o) (1988). Specifically, the "Limitations on Subcontracting" clause provides, as required by the Small Business Act, that the company awarded a supply contract under a small business set-aside is to perform at least 50 percent of the cost of manufacturing the supplies in-house, if it is not a regular dealer of those supplies. Although Vanderbilt certified itself as a manufacturer in the IFB's Walsh-Healey Act representation clause, Vanderbilt nevertheless took exception to the "Limitations on Subcontracting" clause by noting elsewhere in its bid that it intended to subcontract 100 percent of the manufacturing to another small business. As a result, the contracting officer rejected Vanderbilt's bid as nonresponsive on the basis that it did not comply with the IFB's subcontracting limitation.

To be responsive, a bid as submitted must comply in all respects with the material terms of the IFB. *Syston Donner*, B-230945, July 5, 1988, 88-2 CPD ¶ 7. Here, since Vanderbilt clearly took exception to the subcontracting limitation in the IFB by stating that it would subcontract 100 percent of the manufacturing of the items to another firm, DLA properly rejected its bid as nonresponsive. *See Propper Mfg. Co., Inc., et al.*, B-233321, B-233321.2, Jan. 23, 1989, 89-1 CPD ¶ 58.

Vanderbilt contends, however, that its bid was rejected improperly because a Small Business Administration (SBA) regulation, 13 C.F.R. § 121.5(b)(2) (1988), allows a nonmanufacturer to subcontract 100 percent of the manufacturing operations in a total small business set-aside procurement for supplies.

In pertinent part, that regulation provides as follows:

Any concern which submits a bid or offer in its own name, other than on a construction or service contract, but which proposes to furnish a product which it did not itself manufacture, is deemed to be a small business when:

(i) In the case of Government procurement reserved (i.e., set aside) for small businesses, such non-manufacturer must furnish, in the performance of the contract, the product of a small business manufacturer or producer, which end product must be manufactured or produced in the United States. The term "nonmanufacturer" includes a concern which can manufacture or produce the product referred to in the specific procurement but does not do so in connection with that procurement.

In effect, Vanderbilt argues that the SBA regulation, to the extent that it permits a small business bidder who is normally a manufacturer of the item being procured to subcontract for production of the item from another small business, superseded the requirement in the IFB's "Limitations on Subcontracting" clause that the bidder perform at least 50 percent of the cost of manufacturing the supplies. However, SBA, whose views were solicited by DLA in connection with the protest, states that its regulation should not be interpreted in any

manner inconsistent with the statutory requirement that a bidder-manufacturer perform at least 50 percent of the cost of manufacturing supplies.

Notwithstanding its belief that the SBA regulation permitted it to submit a bid proposing to subcontract 100 percent of the manufacturing, Vanderbilt was on notice that the IFB contained a provision which, by requiring performance of at least 50 percent of the manufacturing by the bidder itself, clearly was inconsistent with its position. It was not reasonable for Vanderbilt simply to assume that DLA would adopt its interpretation of the SBA regulation and effectively waive application of the "Limitations on Subcontracting" clause in the IFB, particularly given that the clause in the IFB implements a statutory limitation on subcontracting in the Small Business Act. Rather, since the inconsistency was apparent from examination of the IFB, Vanderbilt should have raised the issue with the contracting agency or our Office before bid opening. *See Bid Protest Regulations*, 4 C.F.R. § 21.1(a)(1) (1989). Doing so would have allowed consideration of the issue and the opportunity to recommend corrective action, if warranted—for example, clarification of the agency's position in light of the SBA regulation—when most practicable, before bids were submitted. By failing to raise the issue before bid opening, Vanderbilt assumed the risk that its bid would be rejected for taking exception to the subcontracting limitation in the IFB.

Vanderbilt also questions whether the awardee intends to perform 100 percent of the manufacturing itself. The record shows that, unlike Vanderbilt, the awardee, Tennier Industries, took no exception to the subcontracting limitation in the IFB and in fact stated in its bid that all manufacturing would take place at its Huntsville, Tennessee facility. Accordingly, we see no basis to object to the award to Tennier.

The protest is denied.

B-236003, October 12, 1989

Procurement

Sealed Bidding

- **Bonds**
- ■ **Justification**
- ■ ■ **GAO review**

Bonding requirements in an invitation for bids for equipment used for the replenishment of supplies and the refueling of ships at sea are not unduly restrictive of competition where the agency experienced a significant percentage of defaults in prior procurements resulting in severe consequences to the Navy mission.

Procurement

Sealed Bidding

■ Bid guarantees

■ ■ Waiver

Requirement for bid, performance and payment bonds can be waived for firms submitting bids through the Canadian Commercial Corporation (CCC) since the Canadian government, pursuant to a letter of agreement with the United States, guarantees all commitments, obligations, and covenants of the CCC in connection with any contract or order issued to the CCC by any contracting activity of the U.S. government.

Matter of: Dohrman Machine Production, Inc.

Dohrman Machine Production, Inc., protests requirements for bid, payment and performance bonds in Department of the Navy invitation for bids (IFB) No. N00029-89-B-4024 for winch, hydraulic and auxiliary equipment. Dohrman contends that the bonding requirements imposed by the solicitation are unauthorized under applicable regulations and unfair since these requirements were waived for the Canadian Commercial Corporation (CCC).

The protest is denied.

The solicitation, issued on April 18, 1989, is the second step of a two-step procurement. The solicitation provides for the procurement of underway replenishment (UNREP) equipment. UNREP equipment, consisting of items such as winches, anti-slack devices, ram tensioners and sliding blocks, is used for replenishment-at-sea and refueling-at-sea stations aboard naval ships. This equipment is used as part of a connected replenishment system which transfers solid cargo and bulk fuel to Naval ships while underway.

The Navy issued five amendments to the IFB, which extended the bid opening date and required domestic firms to furnish a bid guarantee and performance and payment bonds within 10 days after bid acceptance. Amendment No. 3 included an additional bid evaluation criterion applicable solely to the CCC: "Since the Canadian Commercial Corporation is not required to furnish a bid guarantee nor performance and payment bonds, any bid submitted by it shall be adjusted for evaluation purposes by the average of all United States firms' bid guarantee and bonding costs"

Dohrman protests the terms of the solicitation on two grounds: (1) that the bonding provisions were included without the appropriate finding required by Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 228.103-2 (DAC 88-6); and (2) that the bonding requirements give an unfair and unlawful competitive advantage to firms submitting bids through the CCC, notwithstanding the quoted evaluation factor.

We have consistently held that while a bond requirement may, in some circumstances, result in a restriction of competition, it may nevertheless be a necessary and proper means of securing to the government fulfillment of the contractor's obligation under the contract. *Aspen Cleaning Corp.*, B-233983, Mar. 21, 1989, 89-1 CPD ¶ 289. Although as a general rule, in the case of nonconstruction

contracts, agencies are admonished against the use of bonds, Federal Acquisition Regulation (FAR) § 28.103-1(a) (FAC 84-30), the use of bonding is permissible where the bonds are needed to protect the government's interest, regardless of whether the agency's rationale comes within the four reasons for requiring a performance bond that are articulated in FAR § 28.103-2(a). *Aspen Cleaning Corp.*, B-233983, *supra*. In this regard, we recognize that there are circumstances where bonds are needed to ensure performance, and this Office will not disturb a contracting officer's decision that bonds are needed in a nonconstruction situation if the decision is reasonable and made in good faith. *Express Signs Int'l*, B-225738, June 2, 1987, 87-1 CPD ¶ 562.

The Navy states that the decision to include in the solicitation requirements for a bid guarantee and performance and payment bonds is predicated upon its prior experience in procuring UNREP equipment. During the past 9 years, the agency reports, it has awarded 36 contracts for UNREP equipment to 15 small business contractors; none of the contracts contained bonding requirements. Five of those firms have sought protection under the bankruptcy laws prior to equipment delivery. Since installation of the UNREP equipment is scheduled to occur when ships are available during shipyard overhauls, the delivery delays resulted in the failure to provide ships with this critical equipment during their scheduled availability, and necessitated their operation for at least 1-1/2 years with unreliable equipment until rescheduling could occur. In addition, the previous contracts provided for progress payments, as does this IFB, such that contractor default and bankruptcy exposed the Navy to significant financial losses since material and effort that was procured for the government's account was lost.

In view of the Navy's prior experience, and the consequences of default and late delivery, we are unable to conclude that the Navy's requirement for bonds is unreasonable. In addition, Dohrman neither has alleged nor shown that bad faith motivated the contracting officer's decision. Moreover, although the protester also questions whether the agency obtained the authorization needed to impose bonding requirements from the appropriate official required by DFARS § 228.103-2, the record shows that the appropriate official approved the bond requirements for this IFB in the acquisition plan.

Dohrman alternatively argues that the decision not to impose a bonding requirement on the CCC gives the CCC an unfair competitive advantage. The exemption of the CCC from the bonding requirements in this solicitation is the result of a Letter of Agreement between the United States and Canada wherein Canadian firms are encouraged to participate in United States Department of Defense procurements. DFARS subpart 225.71 (DAC 88-8). Pursuant to the agreement, the Canadian government established the CCC to act as the prime contractor on all U.S. government procurements in which Canadian firms bid. The CCC is merely a conduit through which Canadian firms submit bids on U.S. procurements. *See generally* B-168761, May 14, 1970. The agreement specifically states that "the Canadian government guarantees to the U.S. Government all commitments, obligations, and covenants of the [CCC] in connection with any

contract or order issued to said Corporation by any contracting activity of the U.S. Government.” DFARS § 225.7103. Consequently, the Navy waived the requirement for bonds for the CCC.

In regard to the role of the CCC and the Canadian government in Department of Defense procurements, we have stated that “[t]here is no question that non-performance by the Canadian subcontractor would be followed by nonperformance by CCC and under terms of the international agreement the Canadian Government would be liable to the United States Government.” B-168761, *supra*. Since the purpose of performance bonds is to protect the government in case of a contractor default and since the Canadian government has already guaranteed performance or reparation in case of default, additional requirements of bonding would be merely duplicative protection for the United States government. Therefore, it was not improper to waive the requirement for bonds for firms bidding through the CCC.

In any event, since Dohrman is unable to obtain the bonds due to its own financial situation irrespective of any Canadian involvement, and since other domestic firms (including the low bidder) obtained suitable bonding, we find that Dohrman was not prejudiced by any competitive advantage that may have accrued to any Canadian firm by virtue of the waiver.

The protest is denied.

B-235881, October 13, 1989

Procurement

Competitive Negotiation

- Offers
- ■ Cost realism
- ■ ■ Evaluation
- ■ ■ ■ Administrative discretion

Protest that agency improperly awarded time and materials/labor hour contract to firm offering allegedly “below cost” labor hour rate is denied where record shows that agency considered reasonableness and realism of proposed rate and offers an adequate explanation for the admittedly low rate.

Matter of: Southwest Aerospace Corporation

Southwest Aerospace Corporation protests the award of a contract to Teledyne Brown Engineering under request for proposals (RFP) No. F42600-89-R-21824, issued by the Department of the Air Force for repair and maintenance services for the AGTS-36 towed target system. Southwest principally argues that the

award was not in accordance with applicable regulations and did not represent the best value to the government because Teledyne's offer was a "buyin."¹

We deny the protest.

The RFP, which contemplated the award of a requirements type contract, contained different types of line items. The RFP contained several line items, primarily for repair support services, on a time and materials basis. Two line items, for contractor employee travel related expenses, were to be awarded on a cost reimbursement with no fee basis. Data were required to be priced on a fixed-priced basis. The RFP also provided for 1 option year. The RFP instructed firms to submit a single shop rate or composite per-hour labor rate, to be multiplied by the government's estimate of the number of contract hours for the base year and the option year. The RFP further specified that award would be made to the firm offering the most advantageous proposal, considering cost or price and other factors specified elsewhere in the solicitation.²

The agency received offers from Teledyne and Southwest. After evaluation of initial offers, the Air Force made award to Teledyne as the firm submitting the most advantageous proposal based on its lower price. Specifically, Teledyne offered a composite labor rate of \$22.52 per hour for the base year and \$23.65 for the option year (total evaluated price of \$358,715), while the protester offered a rate of \$48.13 for the base year and \$50.54 for the option year (total of \$675,745). This protest followed.

Southwest argues that the Air Force failed to make award to the firm offering the most advantageous proposal. Specifically, Southwest argues that since the Air Force awarded a "cost-type" contract, the Air Force was obligated to conduct a cost realism analysis which would have showed that Teledyne's labor-hour rate was unrealistically low and represented a "buy-in," and was based on use of unskilled labor. Southwest also alleges that Teledyne was not limited by the terms of the award with respect to the amount of subcontracting it could do and the associated burden rates which it could charge on the subcontracts. In this regard, Southwest alleges that Teledyne's burden rate is higher than the rate it offered.³

The Air Force responds that it carefully considered the labor-hour rate offered by Teledyne and concluded that it was both reasonable and realistic. In this connection, the Air Force notes that it was aware that Teledyne's labor-hour rate was significantly lower than the government's estimate, but that it was informed by Defense Contract Audit Agency field representatives that the substantially lower rate offered by Teledyne resulted from the fact that Teledyne intends to perform the contract in a labor surplus area where hourly wages are

¹ In its initial protest, Southwest also alleged that the Air Force had significantly underestimated the dollar value of contractor acquired property. However, the protester did not address the issue in its comments or rebut the Air Force's response. Under these circumstances, we conclude that Southwest has abandoned the issue. See *Prison Match, Inc.*, B-233186, Jan. 4, 1989, 89-1 CPD ¶ 8.

² The RFP did not specify any other evaluation criteria notwithstanding this statement.

³ This allegation is factually erroneous. The record shows that the burden rate offered by Teledyne was in fact lower than the rate offered by Southwest.

significantly lower. The Air Force also argues that the contract contains adequate controls with respect to the amount of subcontracting which Teledyne can engage in since Teledyne cannot subcontract without the written approval of the contracting officer.

As to the reasonableness and realism of Teledyne's proposed hourly rate, we are satisfied that the contracting officer properly concluded that the rate offered was both reasonable and realistic. As noted above, Teledyne intends to perform in a labor surplus area and, thus, the fact that the firm's hourly rate is lower than the government's estimate is, in our opinion, adequately explained. In any event, the fact that the firm may have offered what amounts to a "below cost" hourly rate is of little consequence since firms were required under the RFP to offer firm, fixed labor-hour rates and, consequently, even if Teledyne is required to actually pay its employees more, Teledyne, and not the government, will be liable for any overage. *See Unidyne Corp.*, B-232124, Oct. 20, 1988, 88-2 CPD ¶ 378. Moreover, the agency points out that the contract requires the contractor to notify the government when repair work estimates under the contract reach 75 percent of the estimated labor hours in the contract. Also, the Air Force has requested special review of hours billed to identify any significant departure from the contract estimates. These obviously afford the government protection against billings for excessive labor hours.

Finally, as to the possibility of Teledyne entering into subcontracts in an unlimited fashion and assessing its burden rate thereon, we are satisfied that the contract contains adequate controls for purposes of protecting the government's interests. As noted by the Air Force, the contract prohibits subcontracting without the contracting officer's approval where the dollar value of the subcontract is in excess of \$25,000. *See* Federal Acquisition Regulation (FAR) §§ 52.244-1 (FAC 84-23), 52.244-2 (FAC 84-12) and 52.244-3 (FAC 84-8). Under these circumstances, we cannot say that the Air Force's award decision is either improper or unreasonable.

The protest is denied.

B-236175, B-236175.2, October 13, 1989

Procurement

Sealed Bidding

■ Bids

■ ■ Responsiveness

■ ■ ■ Acceptance time periods

■ ■ ■ ■ Deviation

Bid was properly rejected as nonresponsive where in "Period for Acceptance of Bids" clause and cover letter attached to bid it was stated that bid was for acceptance within 30 days, whereas "Minimum Bid Acceptance Period" clause also included in solicitation required a 60-day bid acceptance period; IFB was not rendered ambiguous by inappropriate inclusion of "Period for Acceptance of

Bids" clause since, reading solicitation as a whole, space provided in the clause for an acceptance period different than 60 days clearly meant a period longer than 60 days.

Matter of: Perkin-Elmer Corporation

Perkin-Elmer Corporation protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DACW69-89-B-0030, issued by the United States Army Corps of Engineers for Plasma Quad PQ2 Plus, or equal, and the award of a contract to VG Instruments, Inc. Although Perkin-Elmer's bid was apparently low, the Army rejected it as nonresponsive for, among other reasons, failure to comply with the minimum bid acceptance period required by the solicitation. Perkin-Elmer protests the rejection of its bid.

We deny the protests.

The IFB included in section K-9 the "Minimum Bid Acceptance Period" clause, as set forth under Federal Acquisition Regulation (FAR) §§ 52.214-16 and 14.201-6(j), which stated that a minimum bid acceptance period of 60 calendar days was required. The clause also provided a space for the bidder to specify its bid acceptance period should the bidder choose to hold its bid open for more than the required 60 days. The clause specifically provided that it superseded any language pertaining to the acceptance period appearing elsewhere in the solicitation and notified bidders that a bid allowing less than the minimum 60-day acceptance period would be rejected. The IFB also included in section L-11 the "Period for Acceptance of Bids" clause as set forth under FAR §§ 52.214-15 and 14.201-6(i), which stated that the bidder agrees to furnish all items at the prices bid within the time specified in the IFB if the bid is accepted within 60 days, unless a different period was inserted by the bidder in the blank space provided.

In its bid, under section K-9, Perkin-Elmer did not complete the blank space, indicating that it did not take exception to the 60-day acceptance period requirement. However, under section L-11, Perkin-Elmer filled in the blank space (for an acceptance period other than 60 days) with 30 calendar days. Additionally, in a cover letter submitted with its bid, Perkin-Elmer provided for bid expiration on July 1, 1989, 30 days after the June 1 bid opening. The Army rejected the firm's bid as nonresponsive based on this and other deficiencies.

Perkin-Elmer contends that its bid was fully consistent with the terms of the IFB and that it should not have been rejected. The firm argues that the inclusion of both clauses (section K-9 and L-11) rendered the IFB ambiguous, and that it reasonably construed the "Period for Acceptance of Bids" clause in section L-11 as an invitation to provide an alternate bid acceptance period shorter than the specified 60 days, notwithstanding that the IFB also set forth 60 days as a minimum bid acceptance period.

Preliminarily, we note that the FAR provides for inclusion of only one, not both, of the bid acceptance period provisions in issue here. Specifically, FAR § 14.201-6(i) states that the "Period for Acceptance of Bids" clause in section L-11 should not be used where a minimum bid acceptance period is specified, as

in the "Minimum Bid Acceptance Period" clause here. However, we find that the agency's inappropriate inclusion of the section L-11 clause did not render the IFB materially defective here.

A solicitation is ambiguous in a legal sense only where, when read as a whole, it is susceptible of two or more reasonable interpretations. *GEM Engineering Co., Inc.*, B-231605.2, Sept. 16, 1988, 88-2 CPD ¶ 252. Here, we do not believe there were two reasonable interpretations; Perkin-Elmer's interpretation of the solicitation was not reasonable reading the IFB as a whole. Section K-9, which by its terms was controlling as to the bid acceptance period, clearly specified a minimum acceptance period of 60 days, and provided that a bidder could only specify a longer acceptance period. While section L-11 did not state that only a longer period could be specified, we think it clear that when read in conjunction with section K-9 section L-11 provided only for an acceptance period of 60 days or longer. While it is unfortunate that the protester may have been confused by the two differently worded clauses, we again note that section K-9 specified the 60-day minimum acceptance period and specifically stated that it superseded any other language in the solicitation pertaining to the acceptance period. We conclude that the protester's interpretation of the solicitation as inviting an alternate bid acceptance period shorter than 60 days was unreasonable.

It is well-established that a provision in a sealed bid solicitation requiring a bid to remain available for the government's acceptance for a certain period is a material requirement that must be complied with at bid opening for the bid to be responsive. *Roadrunner Moving & Storage, Inc.*, B-234616, Mar. 2, 1989, 89-1 CPD ¶ 230. A bidder who is allowed to specify a shorter acceptance period would have an unfair advantage over its competitors; it would be able to refuse award after its bid acceptance period expired should it decide it no longer wanted the award because of unanticipated cost increases, or extend its bid acceptance period after competing bids have been exposed. *Winsar Corp. of Louisiana*, B-226507, June 11, 1987, 87-2 CPD ¶ 585. Thus, as Perkin-Elmer offered a shorter bid acceptance period than required, the Army properly rejected its bid as nonresponsive. (In view of this conclusion, it is unnecessary to address the other bases upon which the agency determined Perkin-Elmer's bid to be nonresponsive.)

Perkin-Elmer also protests that the award to VG was improper because the awardee failed to correctly complete the Buy American-Balance of Payments Program Certificate in the solicitation; essentially, the protester contends that the awardee failed to indicate whether foreign end products listed on an attachment to the certificate met the classification of "qualifying country end products," which would be given the same evaluation preferences over foreign end products that is accorded domestic end products. However, the clause relates solely to the evaluation of bids, specifically, to whether an evaluation preference will be accorded; since only VG submitted a responsive bid, even if all of VG's end products were deemed to be nonqualifying foreign end products, its bid would still be the low responsive bid.

The protests are denied.

Procurement

Contract Management

- **Contract administration**
 - ■ **Convenience termination**
 - ■ ■ **Administrative determination**
 - ■ ■ ■ **GAO review**
-

Procurement

Sealed Bidding

- **Bids**
- ■ **Errors**
- ■ ■ **Error substantiation**

Although contracting agency improperly allowed upward correction of bid to include additional profit, bond costs and insurance costs when the costs were not adequately substantiated, there is no evidence of fraud, bad faith or mutual mistake, the resulting contract was not plainly or palpably illegal, and the contractor may be paid at the contract price where the agency determines that it is not in the government's best interest to terminate the contract.

Matter of: United States Coast Guard—Request for Advance Decision

A United States Coast Guard disbursing officer has requested an advance decision regarding the propriety of using funds appropriated to the Coast Guard to pay for work completed under a contract that we have previously found was awarded at an overstated contract price. For the reasons given below, we conclude that the contractor may be paid at the contract price for work satisfactorily completed.

This matter arises out of our decision in *Lash Corp.*, 68 Comp. Gen. 232 (1989), 89-1 CPD ¶ 120. In that decision, we denied Lash's protest against the Coast Guard's determination to permit upward correction of the bid submitted by Construction and Rigging, Inc. (CRI), in response to invitation for bids No. DTCG50-88-B-65023, for repair of a fuel pier at the Coast Guard Support Center in Kodiak, Alaska. Although we denied the protest, we found that the \$47,393 CRI claimed for additional profit, bond costs and insurance costs was not adequately substantiated and that the contract price thus should not have included this additional amount.

The Coast Guard considered terminating CRI's contract for the convenience of the government based on the overstated contract price, but informs us that it has concluded that termination would not be in the government's best interest, since the contract has been substantially performed. The disbursing officer asks whether, in these circumstances, the contractor may be paid at the contract price, including the \$47,393 at issue in the protest to our Office, for work satisfactorily performed under the contract.

The award of a contract under a sealed bid procurement must be based upon the most favorable cost to the government, assuming the low bid is responsive and the bidder is responsible. See *Detyens Shipyards Inc.*, B-229845, Apr. 19,

1988, 88-1 CPD ¶ 382; *Eastern Technical Enterprises, Inc.*, B-228035, Oct. 27, 1987, 87-2 CPD ¶ 400. An award at an improper price generally is an improper award, *see generally Afghan Carpet Servs., Inc.*, B-231348, Sept. 9, 1988, 88-2 CPD ¶ 224 (award at unreasonable price), and such a contract properly may be terminated under the standard termination for convenience clause. *See Nationwide Roofing and Sheet Metal Co., Inc. v. United States*, 14 Cl. Ct. 733 (1988); *Amarillo Aircraft Sales & Servs., Inc.*, 63 Comp. Gen. 568 (1984), 84-2 CPD ¶ 269; *see also Afghan Carpet Servs. Inc.*, B-231348, *supra*.

Nevertheless, we have previously recognized that an improperly awarded contract need not always be terminated. *See, e.g., Hartridge Equipment Corp.*, B-228303, Jan. 15, 1988, 88-1 CPD ¶ 39. Rather, the appropriate remedy depends upon all the circumstances surrounding the procurement, including, but not limited to, the seriousness of the procurement deficiency, the extent of performance, the urgency of the procurement, and the impact of the recommendation on the contracting agency's mission. 4 C.F.R. § 21.6(b) (1989). Here, since it is not in the government's interest to terminate the contract; the contract price, even as overstated, was still the lowest bid; there is no evidence of fraud, bad faith or mutual mistake; and the contract is not plainly or palpably illegal, *see generally Southwest Marine, Inc.—Request for Reconsideration*, B-219423.2, Nov. 25, 1985, 85-2 CPD ¶ 594; we believe that the contractor may be paid at the contract price for work accepted and satisfactorily performed under the contract.

B-236986, October 20, 1989

Procurement

- Sealed Bidding
 - Invitations for bids
 - ■ Amendments
 - ■ ■ Materiality

An amendment which incorporates into an invitation for bids for lease of a parking lot an additional requirement of minimum operating hours is material since it imposes a legal obligation on the contractor that was not contained in the original solicitation and therefore changes the legal relationship between the parties.

Procurement

- Sealed Bidding
 - Invitations for bids
 - ■ Amendments
 - ■ ■ Acknowledgment
 - ■ ■ ■ Responsiveness

A bidder's failure to acknowledge with its bid a material amendment to an invitation for bids renders the bid nonresponsive.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgment
- ■ ■ ■ Responsiveness

A bidder's intention and commitment to perform in accordance with the terms of a material amendment is determined from the acknowledgment of such amendment or constructively from the bid itself, not from the bidder's past performance under a prior contract. Where a bid does not include an essential requirement which appears only in the amendment, there is no constructive acknowledgment of the amendment.

Matter of: Universal Parking Corporation

Universal Parking Corporation protests the rejection of its bid and the subsequent award of a contract to The Q Companies, under invitation for bids (IFB) No. MDA946-89-L0047, issued by the Department of Defense, Washington Headquarters Services (WHS), for the lease of parking space in the Pentagon north parking area. Universal's bid was rejected as nonresponsive because it failed to acknowledge an amendment to the IFB. Universal contends its failure to acknowledge the amendment should be waived as a minor informality.

We deny the protest.

WHS issued the IFB on August 1, 1989, with bid opening scheduled for August 31. Prior to bid opening, WHS issued amendment No. 1, the only amendment to the solicitation, which incorporated into the IFB the minimum hours for operating the parking lot. Universal, the incumbent contractor and high bidder, failed to acknowledge the amendment. As a result, the contracting officer found Universal's bid nonresponsive.

Universal challenges the contracting officer's determination that its bid was nonresponsive, maintaining that the amendment was a clarification of a preexisting obligation under the solicitation. WHS disagrees, arguing that the amendment is not a clarification as Universal's argument suggests, but instead a material amendment which created a new legal obligation. We agree.

A bid that does not include an acknowledgment of a material amendment must be rejected because, absent such an acknowledgment, the bidder is not obligated to comply with the terms of the amendment, and thus its bid is nonresponsive. *Woodington Corp.*, B-235957, Oct. 11, 1989, 89-2 CPD ¶ 339. Even where an amendment may not have a clear effect on price, quantity, or quality, it nonetheless is considered material where it changes the legal relationship between the parties, as, for example, if the amendment increases or changes the contractor's obligation or responsibilities. *Mak's Cuisine*, B-227017, June 11, 1987, 87-1 CPD ¶ 586. The materiality of an amendment which imposes new legal obligations on the contractor is not diminished by the fact that the amendment may have little or no effect on the bid price or the work to be performed. *Adscon, Inc.*, B-224209, Dec. 10, 1986, 86-2 CPD ¶ 666.

Here, the original IFB provided the following "special lease requirements":

- a. The Lessee will charge a daily maximum amount of \$2.25 per motor vehicle. This daily maximum amount of \$2.25 per motor vehicle will be in effect for the entire term of the lease.
- b. Patrons who have paid the maximum daily parking fee (\$2.25) will be allowed to leave and reenter the parking lot without repaying the daily parking fee.
- c. The parking of motor vehicles will be limited to the paved marked spaces. There will be no motor vehicles double parked.
- d. No keys will be left in the motor vehicles and no keys will be left with the parking attendants.

Amendment No. 1 added the following requirement: "The minimum hours of operation will be 6 a.m. thru 1 p.m., Monday thru Friday except for Legal Holidays."

Under the IFB as originally issued the contractor was free to open and close the parking lot on its own initiative since the solicitation was silent concerning any hours of operation. Similarly, Universal's prior contract did not specify minimum operating hours. However, as a result of the amendment to the current solicitation, the contractor no longer may elect when and how long to operate the parking lot but, instead, is required to operate the parking lot at least during the hours 6 a.m. thru 1 p.m., in accordance with the agency's minimum needs. Since the amendment imposes a new obligation on the contractor which did not exist in the original solicitation and thus changes the legal relationship between the parties, the amendment incorporating it into the IFB clearly was material. *Lake City Management*, B-233986, Mar. 9, 1989, 89-1 CPD ¶ 259; *Mak's Cuisine*, B-227017, *supra*.

Universal argues that the amendment does not change the legal relationship between it and WHS and therefore does not create any additional obligation on Universal's part because, as the incumbent contractor, it chose to maintain hours of operation (5 a.m. thru 6 p.m.) that far exceeded the minimum hours required by the amendment to the current solicitation. In this regard, Universal states that since its prior hours of operation were registered with the Pentagon police, Universal was already bound to keep the parking lot open for a greater length of time than was specified in the amendment.

To the extent that Universal argues that its past performance under the prior contract evidences its intent to adhere to the current solicitation's amendment and, therefore, should be imputed to its current bid, Universal's past practice is not controlling. Rather, a bidder's intention and commitment must be determined from the bid as submitted. *Mckenzie Road Serv., Inc.*, B-192327, Oct. 31, 1978, 78-2 CPD ¶ 310. Here, Universal's bid did not indicate any hours of operation. Further, Universal does not explain why its registration of operating hours with the Pentagon police in connection with its prior contract in any way obligated it to maintain those hours. Thus, given the absence of any reference in the bid to operating hours, Universal would not be bound to any particular operating schedule under a contract awarded pursuant to the current IFB, regardless of its past practice.

Universal also contends that the amendment was not material because it merely clarified an implicit requirement in the IFB to operate the parking lot during reasonable hours in order to meet the needs of the parking lot patrons. We find this argument unpersuasive since there is no reason to assume that the parties to the contract would share the same interpretation of reasonable operating hours, and the requirement for particular operating hours clearly imposed a specific obligation on the contractor which was not present in the original IFB.

Universal also argues that it implicitly accepted the amendment to the IFB when it submitted its bid after the amendment was issued. In this regard, Universal claims that its bid price reflected its intention to operate the parking lot for 13 hours daily.

We have consistently held that an amendment may be constructively acknowledged if the bid itself includes an essential requirement that appears only in the amendment. *C Constr. Co., Inc.*, 67 Comp. Gen. 107 (1987), 87-2 CPD ¶ 534. We fail to see, however, how a bid with no indication whatsoever of the required minimum operating hours or in fact any operating hours, clearly indicates the bidder's intent to be bound by the amendment.

Finally, Universal claims that acceptance of its bid is in the best interests of the government because WHS would benefit by receiving superior service at the best price. It is well-established, however, that the importance of maintaining the integrity of the competitive bidding process outweighs any pecuniary advantage that WHS might gain by accepting a nonresponsive bid. *Vertiflite Air Servs., Inc.*, B-221668, Mar. 19, 1986, 86-1 CPD ¶ 272. Moreover, since Universal failed to acknowledge a material amendment and its bid does not establish its intent to be bound by the terms of the amendment, Universal would not be legally bound to perform in accordance with the terms of the amendment, and the government would bear the risk that performance would not meet its needs. See *C Constr. Co., Inc.*, 67 Comp. Gen. 107, *supra*.

The protest is denied.

B-236406, October 23, 1989

Procurement

Special Procurement Methods/Categories

- Architect/engineering services
- ■ Contractors
- ■ ■ Price negotiation
- ■ ■ ■ Termination

Protest that in procuring architect-engineer services under the Brooks Act contracting agency improperly terminated negotiations with protester is denied where record clearly shows that agency and protester could not come to a mutually acceptable agreement.

Procurement

Special Procurement Methods/Categories

- **Architect/engineering services**
- ■ **Contractors**
- ■ ■ **Price negotiation**
- ■ ■ ■ **Termination**

Protest that after accepting the price breakdown in protester's proposal the contracting agency reversed its decision to protester's prejudice because protester would not have proceeded with further negotiations if it had known the breakdown was unacceptable is denied since at the time the agency did not have complete pricing data and the protester should have been aware that negotiations would be terminated if no agreement could be reached.

Procurement

Bid Protests

- **GAO procedures**
- ■ **Protest timeliness**
- ■ ■ **10-day rule**

Protest that statement of work in architect-engineer contract was inadequate is untimely when not filed within 10 working days of the date protester received a draft copy of the contract in preparation for price negotiations.

Matter of: Inca Engineers, Inc.

Inca Engineers, Inc., protests the decision by the Forest Service to terminate negotiations with the firm under request for proposals No. R6-3-89-11s for design and construction services for the Mount St. Helens National Volcanic Monument. The solicitation was issued under the Brooks Act, 40 U.S.C. §§ 541-544 (Supp. IV 1986), which prescribes procedures for acquiring architect-engineer (A-E) services.

We deny the protest in part and dismiss it in part.

Generally, under the solicitation procedures set forth in the Brooks Act, which govern the procurement of A-E services, and in the implementing regulations in Federal Acquisition Regulation (FAR) subpart 36.6, the contracting agency must publicly announce requirements for A-E services. An A-E evaluation board set up by the agency evaluates the A-E performance data and statements of qualifications of firms already on file, as well as those submitted in response to the announcement of a particular project. The board must then conduct "discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required service." 40 U.S.C. § 543. The firms selected for discussions should include "at least three of the most highly qualified firms." FAR § 36.602-3. Thereafter, the board recommends to the selection official, in order of preference, no less than three firms deemed most highly qualified.

The selection official, with the advice of appropriate technical and staff representatives, then lists, in the order of preference, the firms most qualified to per-

form the required work. FAR § 36.602-4. Negotiations are held with the firm ranked first. If the agency is unable to agree with that firm as to a fair and reasonable price, negotiations are terminated and the second ranked firm is invited to submit its proposed fee. FAR § 36.606.

Here, on October 12, 1988, the Forest Service announced in the *Commerce Business Daily* its requirement for services for design and contract document preparation for a hydroelectric project and primary power distribution system. The services were required to assist in planning the development of the Mount St. Helens National Volcanic Monument. In response, eight firms submitted qualifications statements. The evaluation board evaluated the qualifications of these firms, and after interviews with the top three firms, selected Inca as the top rated firm. The selection official agreed with this determination and on April 7, 1989, notified Inca that it had been selected as the top rated firm.

Subsequently, the Forest Service commenced fee negotiations with Inca. Pursuant to the proposed contract Inca was required to submit a lump-sum price to perform design services and a lump-sum price to provide construction assistance and an operations and maintenance (O/M) manual. Two of Inca's initial price proposals were rejected as too high. On June 30, Inca submitted a revised offer of \$690,000 (\$620,000, design services; \$70,000, construction assistance and O/M manual), to match the Forest Service's upper price limit. The offer, however, did not include any cost or pricing data. On July 7, the Forest Service informed Inca that the overall price appeared acceptable, but that cost and pricing data were required to be submitted.

Inca subsequently submitted its complete revised price proposal with cost and pricing data on July 18, and in reviewing it, the contracting officer became concerned with some of the technical aspects of the proposal. Specifically, the Forest Service found that Inca based its price proposal on a number of design assumptions and proposal clarifications which were unacceptable. For example, Inca offered to prepare only three contract packages, while the Forest Service anticipated that the number would be determined during the preliminary analysis phase of the contract and would probably involve six contract packages. Inca also limited the penstock crossing to two minor stream crossings which the Forest Service found unacceptable given that the penstock is between 13,000 and 15,000 feet long.¹

On July 19, the Forest Service discussed with Inca the technical and cost portions of its proposal with which the agency was concerned. The Forest Service informed Inca that the assumptions and proposal clarifications were unacceptable. The Forest Service also requested Inca to breakdown the proposed construction assistance rate, and to shift some work hours from the design work to the construction assistance and O/M manual portions of the contract. In the revised proposal which Inca submitted on July 20, Inca did shift some dollars from design to construction, but refused to change the design assumptions in its technical proposal without a price increase. As a result, the Forest Service de-

¹ A penstock is a conduit for conveying water to a water wheel or turbine.

terminated that Inca's proposal remained technically unacceptable and was unreasonable in price.

Concerning price unreasonableness, the Forest Service found that the amount proposed for construction assistance was inadequate for even minimum contract administration; Inca's proposal was based on a construction cost estimate of \$6.3 million compared to the government estimate of \$4.6 million; Inca's and its subcontractor's engineering drawings averaged \$4,800 and \$10,000 per drawing, respectively, compared to an average of \$2,400 to \$3,000 for Forest Service projects and \$5,000 for Corps of Engineers projects; Inca's average cost per engineering report was \$40,348, while the Forest Service historically paid approximately \$30,000 per report; and because Inca proposed to use two-thirds of its work hours in the preliminary analyses and schematic design phases, when in fact a substantial portion of the work would be required during the later design development and construction documents phases, Inca's proposal was unbalanced. As a result of these findings, the Forest Service terminated negotiations with Inca and commenced negotiations with the second ranked firm.

Inca's primary complaint is that, according to Inca, on July 7 the Forest Service accepted Inca's best and final offer of \$690,000, including the breakdown of \$620,000 for design services and \$70,000 to provide construction assistance and an O/M manual, but later reversed its decision and tried to persuade Inca to maintain the total price while shifting costs from the design services to the construction assistance portion of the proposal. Inca asserts that if it had known on July 7 that the \$620,000/\$70,000 breakdown was not acceptable, it would not have proceeded with the additional 2 weeks of negotiations.

Inca further argues that its offer is fair and reasonable. Inca contends that its price is not unbalanced because the preliminary and schematic analyses involve considerable time and effort; it based its proposal on the government's \$4.6 million estimate for construction costs; and its average cost per drawing is \$4,340, which compares favorably to the Corps' experience of \$5,000 per drawing. Inca also agrees, however, that it made certain design assumptions that were unacceptable to the Forest Service, for example, that it would provide only three contract packages and two minor penstock crossings. Finally, Inca complains that the government provided an inadequate statement of work in the draft contract and that Inca was required to spend a considerable amount of time and money to develop an adequate statement of work.

Inca's argument that it would not have continued negotiations if it had been informed that its \$620,000 (design services)/\$70,000 (construction assistance) breakdown was unacceptable does not provide a basis for us to question the Forest Service's decision to terminate negotiations with Inca. There is no indication that at the time the Forest Service told Inca its price was acceptable the agency had accepted the offer or was acting in bad faith or attempting to mislead Inca. Rather, at that time, the Forest Service did not have a complete cost proposal from Inca and it was only after receiving the complete proposal that the Forest Service determined that the breakdown was unacceptable. Since the Brooks Act procedures, of which Inca was aware, provide for the most qualified

firm and the agency to negotiate a price and for the agency to terminate negotiations if no agreement is reached, by participating in the procurement, Inca was required to accept the risk that negotiations might fail.

Nor do we find that the Forest Service improperly terminated negotiations with Inca. As noted above, the Brooks Act procedures specifically provide for the termination of negotiations if the contractor and the agency cannot agree on a fair and reasonable price. Here, Inca argues that its proposed price was reasonable and disagrees with certain of the Forest Service's conclusions, specifically, its proposed cost for drawings and whether the proposal was unbalanced. Inca concedes, however, that it made certain technical and design assumptions which are unacceptable to the Forest Service and which Inca is not willing to change. Given this factor, it is clear that the parties could not reach an agreement and thus that negotiations were properly terminated.

Finally, insofar as Inca argues that the statement of work was inadequate, its protest is untimely. Under our Bid Protest Regulations, a protest that concerns other than an alleged solicitation impropriety must be filed within 10 working days after the protester knows or should know the basis of protest. 4 C.F.R. § 21.2(a)(2) (1989). Here, the Forest Service submitted a draft of the proposed contract to Inca on April 20, 1989, and Inca thus was required to protest that the statement of work was inadequate within 10 working days of April 20. Since Inca did not file its protest until August 2, it is clearly untimely on this ground.

The protest is denied in part and dismissed in part.

B-233607, October 26, 1989

Appropriations/Financial Management

Appropriation Availability

■ Purpose availability

■ ■ Necessary expenses rule

■ ■ ■ Awards/honoraria

The spouse of an employee was issued invitational travel orders to attend a Departmental Awards Ceremony honoring the employee. Her travel expense claim may be paid. Under 5 U.S.C. § 4503 (1982), each agency head has the discretion to determine the award to be given and the ceremony commensurate with that award and to incur necessary expenses to that end. If the agency determines that the presence of the employee's spouse would further the purposes of the awards program, travel expenses for the spouse may be considered a "necessary expense" under 5 U.S.C. § 4503. 54 Comp. Gen. 1054 (1975) is overruled.

Matter of: Sharon S. Rutledge—Travel Expenses to Attend Awards Ceremony—Spouse of Recipient

This decision is in response to a request from an Authorized Certifying Officer, Office of Surface Mining Reclamation and Enforcement, Department of the Interior. The question presented is whether Mrs. Sharon S. Rutledge may be reimbursed travel expenses. We conclude that she may be reimbursed for the following reasons.

Background

Mr. Peter A. Rutledge, an employee of the Office of Surface Mining Reclamation and Enforcement, Denver, Colorado, was selected to receive an award at a Departmental Honor Awards Ceremony in Washington, D.C. The agency issued travel orders to his spouse, Mrs. Sharon S. Rutledge, inviting her to travel with her husband and attend the awards ceremony with him. Those orders provided that she would be reimbursed all necessary travel and transportation expenses.

Following completion of round-trip travel, Mrs. Rutledge submitted her travel voucher in the amount of \$536.60. The agency disallowed payment on the basis that it was not a "necessary expense," citing 5 U.S.C. § 4503 (1982) and 54 Comp. Gen. 1054 (1975).

In its report to our Office the agency stated that the travel authorization was erroneously issued, but that Mrs. Rutledge had incurred these expenses in good faith reliance on those travel orders, had performed travel under the reasonable belief that her expenses would be paid, and had no knowledge or reason to know that the travel authorization issued to her was erroneous. In view thereof, the agency has taken the position that her claim is appropriate for submission to Congress as a meritorious claim.

Opinion

Section 4503 of title 5, United States Code (1982), provides authority for an agency head to pay cash awards to, and "incur necessary expense" for the honorary recognition of employees who meet the stated statutory criteria for such awards.

In 54 Comp. Gen. 1054, *supra*, we interpreted the phrase "incur necessary expense" in 5 U.S.C. § 4503 to limit expenses to those which were "a direct and essential expense of the award." *Id.* at 1055. We concluded that since the presence of family members was not directly related to the award or its presentation, expenses of their travel may not be reimbursed as such a "direct and essential expense."

We have reevaluated 54 Comp. Gen. 1054 in light of well-established principles which deal more generally with the "necessary expense" concept. In applying the basic statutory rule (31 U.S.C. § 1301(a)) that appropriated funds may be used only for the purposes for which they are appropriated, we have consistently held that an expenditure "is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function, and if it is not otherwise prohibited by law." *Prize Drawing at Army Recruiting Events*, B-230062, Dec. 22, 1988, quoting from 66 Comp. Gen. 356 (1987). Likewise, we observed in *Implementation of Army Safety Program*, B-223608, Dec. 19, 1988:

... Where a given expenditure is neither specifically provided for nor prohibited, the question is whether it bears a reasonable relationship to fulfilling an authorized purpose or function of the agency. ... This, in the first instance, is a matter of agency discretion. ... [T]he question is whether

the expenditure falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range.

We recently had occasion to consider the phrase "necessary expense" in the specific context of agency discretion under 5 U.S.C. § 4503 in *Refreshments at Awards Ceremony*, 65 Comp. Gen. 738 (1986). While we recognized the general rule that appropriated funds may not be used to provide free food to government employees, we pointed out that the question of the propriety of such expenditures is not to be treated in a vacuum. Their propriety must be measured relative to the specific appropriation to be charged, or the specific program to be served. We analyzed the appropriateness of expenditures for awards ceremonies in that context and concluded that should the agency determine that a reception with refreshments would materially enhance the awards ceremony, the cost of those refreshments may be considered a "necessary expense," for the purposes of 5 U.S.C. § 4503. *Id.* at 740.

In light of the above decisions, we believe that to equate the phrase "necessary expense" with "a direct and essential expense of the award," as we did in 54 Comp. Gen. 1054, is too restrictive and not consistent with the discretion vested in the agency head to pay a cash award and make the ceremony commensurate with the award to be given. Therefore, if the head of an agency determines that it would further the purposes of the awards program for the spouse of an award recipient to be present at the award ceremony, then his or her travel expense may be considered a "necessary expense" for the purposes of 5 U.S.C. § 4503. Since we are overruling 54 Comp. Gen. 1054, *supra*, we are advising the Office of Personnel Management of this decision and inviting that office to consider issuing regulations to cover this subject.

Accordingly, 54 Comp. Gen. 1054, *supra*, will no longer be followed and Mrs. Rutledge's travel voucher may be paid.

B-233993, October 27, 1989

Appropriations/Financial Management

Appropriation Availability

- Time availability
- ■ Fiscal-year appropriation
- ■ ■ Claim settlement
- ■ ■ ■ Retroactive compensation

Agency should charge back pay claims awarded pursuant to an administrative determination to the fiscal year or years to which the award related.

Appropriations/Financial Management

Judgment Payments

■ Permanent/indefinite appropriation

■ ■ Availability

Back pay claims awarded by judicial determination resulting in a final judgment should be paid from the judgment fund established by 31 U.S.C. § 1304.

Appropriations/Financial Management

Appropriation Availability

■ Time availability

■ ■ Fiscal-year appropriation

■ ■ ■ Claim settlement

■ ■ ■ ■ Interest

Civilian Personnel

Compensation

■ Retroactive compensation

■ ■ Interest

Effective December 22, 1987, interest on back pay claims applies to periods before and after that date and is chargeable to the same appropriations and in the same manner as is the back pay upon which the interest is paid.

Matter of: Veterans Administration—Appropriation Chargeable for Back Pay Claims

By letter dated December 21, 1988, the Director, Finance Service, Veterans Administration, asked for our decision concerning the appropriation chargeable on back pay awards made by an appropriate authority to an employee or former employee who, while employed by the federal government, was affected by an unjustified or unwarranted personnel action. The Director is concerned that “[t]he fact that the outcome of an appeal can not be determined in advance negates establishing an obligation [prior to final determination] because there is no definite commitment for payment of appropriated funds.”

For the reasons given below, we conclude that administrative back pay awards should be charged to, and paid from, the agency appropriation covering the fiscal year or years to which the award relates. Back pay claims awarded by the judgment of a court or settlement are payable from the judgment fund. Except for a limited exception, interest on back pay awards is payable from the same appropriation as the back pay award.

The Director specifically asked that we provide our opinion on the following four questions.

1) If the back pay is to be made for a period other than the fiscal year in which the final decision is made, should the appropriation current in the fiscal year in which the final decision is made be the one to be charged with the involved payment or should the payment be made out of the funds of the fiscal year or years to which the compensation is applicable?

2) Is there a difference in determining which fiscal year to charge if the final decision is made by the employing agency as opposed to being made by either an administrative entity outside the employing agency or by a court decision?

3) Since Public Law 100-202 enacted December 22, 1987 provides for payment of interest on back pay claims, should such interest be charged to the appropriation in the same manner as the back pay?

4) If your decision on the questions concerning back pay advises that back pay is to be charged to the appropriation of the fiscal year or fiscal years to which the compensation is applicable, must payment of interest be deferred until December 22, 1987 or thereafter?

Back Pay Awards For Prior Fiscal Year

As the first question indicates, when the events giving rise to a claim occur in one year and settlement occurs in a later fiscal year, an issue may arise concerning which fiscal year's appropriation to charge. The treatment of federal employees' compensation and related allowances is well settled—such expenses are charged to the appropriation for the fiscal year in which the work was performed, or in the case of wrongful termination, for the period of time deemed valid service under the Back Pay Act. *See* 58 Comp. Gen. 115 (1978). If the claim covers more than one fiscal year, the payment is prorated accordingly.¹

Administrative vs. Judicial Determination

Appropriations provided for regular governmental operations or activities, even though these operations or activities give rise to a cause of action, are not available to pay court judgments in the absence of specific authority. 40 Comp. Gen. 95, 97 (1960). In order to simplify the payment of such judgments, Congress enacted 31 U.S.C. § 1304(a) (1982) which provides for payments of “final judgments, awards, and compromise settlements,” when certified by the Comptroller General. However, this permanent indefinite appropriation, i.e., the judgment fund, does not encompass payment of administrative awards made either by the employing agency or an outside administrative entity.

The language of the relevant provision of the judgment fund statute clearly limits its application to final judgments of a court of law and settlements entered into under the authority of the Attorney General. When entitlement to back pay arises from an administrative determination of the employing agency, the back pay is payable by the employing agency from its own appropriations. *See* 58 Comp. Gen. 311 (1979). When the payment is based on an administrative determination, the back pay should be charged to the fiscal year(s) to which the payment relates. Except as discussed below, payment of an administrative settlement may not be made from the permanent appropriation for judgments. *See*, B-199291, June 19, 1981.

¹ In 58 Comp. Gen. 115 (1978), we held that agency contributions to an employee's retirement account, following restoration after an improper termination, where not payable from the permanent judgment appropriation, must be prorated among the fiscal years covered. Although that case involved back pay under the Back Pay Act, Title VII of the Civil Rights Act, and the Veterans Preference Act, we see no reason why, for obligation purposes, administrative payments of back pay should be treated differently.

Interest On Back Pay Act Awards After December 22, 1987

Except for the limited exception discussed below, interest under the Back Pay Act is payable from the same appropriation or appropriations and in the same manner as the back pay to which the interest applies. *See* 5 U.S.C. § 5596(b)(2)(C), added by Pub. L. No. 100-202, § 623(a), (b), 101 Stat. 1329, 1329-429, December 22, 1987. Therefore, interest awarded pursuant to an administrative determination is chargeable to the fiscal year or years to which the back pay award relates. When a court makes a final judgment awarding back pay, the interest is paid from the permanent, indefinite judgment fund appropriation created by section 1304 of title 31; the fiscal year question is irrelevant when this fund is used.

Interest On Awards For Periods Prior To December 22, 1987

The last question concerns whether payment of interest may be made for periods prior to December 22, 1987, or only for periods beginning thereafter. The amendments to the Back Pay Act which took effect on December 22, 1987, allow for payment of interest, and apply to any employee found, in a final judgment entered or a final decision otherwise rendered on or after December 22, 1987, to have been the subject of an unjustified or unwarranted personnel action, the correction of which entitles the employee to payment under the Back Pay Act. Pub. L. No. 100-202, § 623(b)(1), 101 Stat. 1329, 1329-429 (1987). Interest is computed on the award amount from the beginning of the unjustified withdrawal or reduction in pay that gave rise to the award until not more than 30 days before the date on which payment is made. Therefore, interest on judgments or determinations entered after the effective date apply to back payments covering periods before December 22, 1987, as well as after.

Judgments or other final decisions or determinations entered before the effective date are not covered by the Back Pay Act interest provisions except to the extent that the right to interest was specifically reserved and the award qualifies for the exception contained in § 623(b)(2) of Pub. L. No. 100-202, 101 Stat. 1329, 1329-429 (1987). The 1987 amendments to the Back Pay Act make interest from certain pre-enactment cases, where interest was specifically reserved, payable from the judgment fund. *See* Pub. L. No. 100-202, § 623(b)(2)(A) and (c), 101 Stat. 1329, 1329-429, December 22, 1987.

B-236027, October 27, 1989

Procurement

Competitive Negotiation

■ **Discussion reopening**

■ ■ **Propriety**

Procurement

Socio-Economic Policies

■ **Small businesses**

■ ■ **Contract awards**

■ ■ ■ **Size status**

■ ■ ■ ■ **Misrepresentation**

Protest of reopening of discussions with original offerors that remained in the competitive range is denied where agency terminated award to the protester under small business set-aside due to Small Business Administration's final determination that protester was other than small since conducting a new procurement in such circumstances is not required.

Matter of: Bos'n Towing and Salvage Company

Bos'n Towing and Salvage Company protests the Navy's reopening of discussions for the award of a contract under request for proposals (RFP) No. N68836-88-R-0129, a small business set-aside to provide tug and towing services in the Port Canaveral, Florida area. The Navy's earlier award to Bos'n under the RFP was terminated due to the Small Business Administration's (SBA) final determination that the firm was other than small. Bos'n contends that the Navy should have resolicited the requirement instead of reopening discussions with the original offerors under the RFP.

We deny the protest.

The solicitation was issued on July 28, 1988, and called for offers for a requirements type contract for a base period of 9 months and 4 option years. The prior contract for these services, which had been in effect since December 1, 1986, expired on April 30, 1989.¹

Bos'n, which states that it was formed solely for providing the services required under the RFP, submitted an offer and was awarded a contract on March 28, 1989, with an effective date of May 1. Shortly after the award was made, Petchem, Inc., the incumbent contractor for these services, filed a protest with the contracting officer challenging the size status of Bos'n. That protest was subsequently forwarded to the regional office of the SBA which on May 9 determined Bos'n to be other than a small business. The SBA's determination was based upon the firm's close affiliation with and undue reliance upon Commodore Towing and Barge Company and Great Lakes Towing Company, both large businesses. Bos'n filed a May 17 appeal with the SBA Office of Hearings and Appeals which was denied on June 8, 1989. Based upon the final determination of

¹ The Navy reports that in light of the numerous protests that have been filed under this RFP, the agency has been using Navy tugs for these services since the prior contract expired.

the SBA that Bos'n was other than a small business for this procurement, the Navy terminated Bos'n's contract for the convenience of the government on June 28. (As a result of a previous stop-work order, Bos'n had performed no work under the contract.)

The contracting officer, rather than resoliciting the requirement, and because adequate small business competition had been achieved, reopened discussions with those original offerors which had remained in the competitive range under the RFP. This protest followed. Although best and final offers have been received by the agency, the Navy reports that due to the pending protest no award has been made to date.

Bos'n challenges the Navy's decision to reopen discussions with the small business offerors remaining in the competitive range.² The protester essentially argues that the Navy is required to resolicit the procurement since with the passage of time involved in the prior protests, the actual duration of performance of the contract is less than originally stated.

The Navy maintains that reopening discussions without resolicitation was reasonable here (especially in light of the "laborious and litigious" history of this procurement), and since more than one small business offeror remained in the competitive range. The Navy reasoned that since Bos'n had not yet performed any part of the contract, and since only a relatively short period of time had passed since the termination of Bos'n's contract, the government's best interest would be better served by reopening discussions rather than unnecessarily duplicating the acquisition process to date.

Here, after a timely size status protest, Bos'n was determined to be other than a small business and ineligible to compete in this procurement, which led the agency to terminate the award to Bos'n. We have recognized that an agency's termination of an improper award to other than a small business and the subsequent reopening of discussions under the original solicitation is an appropriate remedy in such circumstances. See *Maximus, Inc.*, 68 Comp. Gen. 69 (1988), 88-2 CPD ¶ 467. Moreover, contrary to the protester's position, a change in the proposed duration of a contract since the original solicitation was issued is not necessarily a compelling reason to cancel and resolicit a procurement where, as here, all that is required is a revised statement of performance which can be accomplished by a simple solicitation amendment. Cf. *id.*

Accordingly, the protest is denied.

² In its June 29 protest letter, Bos'n also requested that the Navy be precluded from proceeding under the procurement until the final outcome of its motion to reopen the proceeding at the SBA Office of Hearings and Appeals. Bos'n therein argued that the SBA mistakenly decided the protester's large business affiliations. We note, however, that on September 15, the SBA denied that motion and affirmed its final determination that Bos'n was other than a small business.

Procurement

Special Procurement Methods/Categories

- In-house performance
- ■ Evaluation criteria
- ■ ■ Cost estimates

Protest of determination to perform trash pickup service and operation of a construction debris landfill in-house rather than by contract is denied where the protester has not shown that the agency's prorated allocation of certain government equipment operating costs, as adjusted under an administrative appeal, was inaccurate or violated Office of Management and Budget Circular A-76 procedures for determining the cost of in-house operation versus contracting.

Matter of: EPD Enterprises, Inc.

EPD Enterprises, Inc., protests the Marine Corps' determination to continue in-house performance of trash pickup service and operation of a construction debris landfill at Marine Corps Air Station, Cherry Point, North Carolina, because it was more economical than contracting with EPD. The Marine Corps based its determination on a cost comparison of the agency's in-house estimate with EPD's bid under invitation for bids (IFB) No. N62470-89-B-4031, pursuant to Office of Management and Budget (OMB) Circular A-76.

We deny the protest.

In accordance with the Circular, the Marine Corps compared the government estimate of the total costs of continuing in-house performance with the sum of the total costs associated with the acceptance of EPD's offer plus an OMB imposed 10 percent conversion differential. The cost comparison, as adjusted by the Marine Corps Commercial Activities Review Board in response to an appeal by EPD, showed that costs associated with EPD's bid would be \$10,206 greater than in-house performance.

EPD protests that, despite adjustments the review board made as a result of EPD's appeal, the Marine Corps has underestimated costs of in-house performance in a way that materially affects the outcome of the cost comparison. Specifically, EPD contends that the Marine Corps has underestimated depreciation, maintenance and repair, and fuel costs for a bulldozer used in the landfill operations which was not being supplied as government-furnished equipment.¹

Where a contracting agency uses the procurement system to aid in its determination whether to contract out, we will review a protest that a bid has been arbitrarily rejected to determine if the agency conducted the cost comparison in accordance with applicable procedures. To succeed in its protest, a protester must demonstrate not only that the agency failed to follow established procedures, but that this failure could have materially affected the outcome of the

¹ Initially, EPD also alleged that the Marine Corps failed to include in the government estimate the costs of transporting the bulldozer between the landfill and other sites. Because the Air Force rebutted this argument in its report on the protest, and the protester did not pursue this basis of protest in its comments, we consider it abandoned. See *Pan Am World Servs., Inc.*, B-235976, Sept. 28, 1989, 89-2 CPD ¶ 283.

cost comparison. *Bay Tankers, Inc., et al.*, B-224480.6 *et al.*, Mar. 25, 1988, 88-1 CPD ¶ 306.

Here, the agency's initial cost comparison omitted the costs associated with operation of the bulldozer in question. In response to EPD's cost comparison appeal, the agency review board added \$11,309.01 to the in-house cost estimate: \$5,443.77 for depreciation, \$5,090.79 for maintenance and repair of the bulldozer (\$1,508.22 for labor, \$3,587.57 for material), and \$774.45 for fuel cost to operate the bulldozer. The board calculated these costs based on use of the bulldozer 35 percent of the time to support the construction debris landfill operation. EPD argues that proper calculation of the bulldozer costs on a 100 percent basis would increase the estimated cost of in-house performance by more than \$25,000, which would be sufficient to warrant award to EPD.

EPD contends that there is no evidence in the management study to indicate that the bulldozer is used for other functions, and therefore 100 percent of the bulldozer's costs should be included in the government estimate, rather than the 35 percent included by the board in its adjustment to the cost comparison.

Our review of the record leads us to conclude otherwise. The management study stated that an engineering equipment operator augmented refuse collection and disposal personnel by operating the bulldozer to compact and cover refuse at the construction debris landfill for only approximately 700 hours per year. Neither the equipment operator's salary nor the costs associated with the bulldozer were included in the original government estimate. The review board determined that the work required under the IFB's Performance Work Statement could not be accomplished without the bulldozer, and that without including costs associated with the bulldozer, the government and the contractor were not bidding on the same scope of work. The board calculated that the bulldozer was used 35 percent of the time to support the construction debris landfill operation by dividing the 700 hours specified in the management study by the normal labor rate of 2,087 man hours available per year. Although the 700 hours equated to 33.5 percent of the time, the review board gave the protester the benefit of the doubt and used the 35 percent factor to calculate the costs associated with the bulldozer. For the evaluation under the cost comparison appeal, the contracting activity further supported the 35 percent use factor by establishing that the bulldozer was used for other standing work and under specific work orders and tickets, which included sludge handling from a disposal plant, unpaved road maintenance, utility right of way clearing, and outside storage area maintenance.

We have recognized that OMB Circular A-76 empowers agencies to review and, where necessary, to adjust its in-house estimate to correct the possibility that the government estimate was not based on the scope of work specified in the solicitation. *Winston Corp.—Request for Recon.*, B-229735.3, Oct. 4, 1988, 88-2 CPD ¶ 311; *Trend Western Technical Corp.*, B-212410.2, Dec. 27, 1983, 84-1 CPD ¶ 25. To assure that all significant and measurable costs are included in the government estimate, Chapter 2, Section H of the OMB Cost Comparison Handbook provides that additional costs resulting from unusual or special circumstances,

which may be encountered in particular cost studies, should be included in the government's cost estimate. Consistent with this guidance, here the Marine Corps review board revised the government estimate to include costs for a bulldozer which was not entirely dedicated to the function under study, but which was associated with direct accomplishment of work outlined in the Performance Work Statement.

The Handbook does not preclude proration of equipment costs in a case like this to reflect the amount actually attributable to the function under study. Here, the government's records show that for the most recent available calendar year the bulldozer was used for 700 hours in conjunction with landfill operations, and for 1293.2 hours under work orders and tickets associated with unrelated sludge handling, road maintenance, right of way clearing and outside storage area maintenance. Accordingly, we find no basis for objection to the review board's inclusion of only 35 percent of the bulldozer's costs in the government estimate, since this percentage accurately reflects the proportion of the bulldozer's use which was associated with the landfill operations. *See ISS Energy Servs. Inc.*, B-211171, Aug. 1, 1983, 83-2 CPD ¶ 145.

EPD also contends that the Marine Corps has grossly understated the bulldozer's maintenance and repair and fuel costs. According to EPD, these costs are low in comparison with established commercial costs. Furthermore, EPD argues, the expected maintenance hours which the Marine Corps attributes to the bulldozer are only about one-third of the maintenance hours projected for bulldozers in NAVFAC P-300, Management of Transportation Equipment, an official agency publication.

The Marine Corps states that the estimates used in the cost comparison appeal decision were based on the average actual usage figures for the most recent period of time. We find no basis to object to the Marine Corps calculations based on these actual use figures as more accurate and thus more appropriate for cost comparison purposes than the estimating guide suggested by the protester.

In accordance with Chapter 2, Section H of the Handbook, the Marine Corps has explained the underlying assumptions and methods of computation it used to determine the bulldozer's costs. The figures used in computing total equipment costs were based on source documents, shop repair orders and vehicle fuel system vehicle fuel reports. The costs were prorated based on the 700 engineering equipment operator hours to determine the percentage of total documented costs that were attributable to the operation of the construction debris landfill. The 700 hours were documented in the Facilities History File maintained by the Facilities Maintenance Department and relate directly to the labor hours charged through the official accounting records by Job Order Number to the landfill operation function. There is nothing in the record to suggest that these cost calculations are either inaccurate or contrary to cost comparison guidelines. EPD's mere disagreement with the agency's cost study result is not sufficient to establish that the cost comparison was flawed. *See Raytheon Support Servs. Co.*, B-228352, Jan. 19, 1988, 88-1 CPD ¶ 44.

The protest is denied.

Appropriations/Financial Management

Appropriation Availability

- **Purpose availability**
- ■ **Necessary expenses rule**
- ■ ■ **Awards/honoraria**

The spouse of an employee was issued invitational travel orders to attend a Departmental Awards Ceremony honoring the employee. Her travel expense claim may be paid. Under 5 U.S.C. § 4503 (1982), each agency head has the discretion to determine the award to be given and the ceremony commensurate with that award and to incur necessary expenses to that end. If the agency determines that the presence of the employee's spouse would further the purposes of the awards program, travel expenses for the spouse may be considered a "necessary expense" under 5 U.S.C. § 4503. 54 Comp. Gen. 1054 (1975) is overruled.

Appropriation Availability

38

- **Time availability**
- ■ **Fiscal-year appropriation**
- ■ ■ **Claim settlement**
- ■ ■ ■ **Retroactive compensation**

Agency should charge back pay claims awarded pursuant to an administrative determination to the fiscal year or years to which the award related.

40

Judgment Payments

- **Permanent/indefinite appropriation**
- ■ **Availability**

Back pay claims awarded by judicial determination resulting in a final judgment should be paid from the judgment fund established by 31 U.S.C. § 1304.

41

Civilian Personnel

Compensation

■ Labor standards

■ ■ Exemptions

■ ■ ■ Administrative determination

■ ■ ■ ■ GAO review

Pursuant to 4 C.F.R. Part 22, an agency and a union jointly request a determination from the Comptroller General on the exempt/nonexempt status for overtime compensation under the Fair Labor Standards Act (FLSA) of a grade GS-12 Audio Visual Production Officer. Since the Office of Personnel Management has the authority to administer the FLSA under 29 U.S.C. § 204(f) (1982) for federal employees, including the authority to make final determinations as to whether employees are covered by its various provisions, the General Accounting Office will not consider overtime claims under FLSA where the employee's position has been classified by OPM as exempt. Appeals of classification status should be directed to OPM.

17

■ Overtime

■ ■ Claims

■ ■ ■ Statutes of limitation

The fact that an employee's grievance concerning overtime pay was untimely filed under the terms of a collective bargaining agreement does not preclude consideration of his claim for such pay by the General Accounting Office provided it is filed within the 6 years prescribed in 31 U.S.C. § 3702.

17

■ Overtime

■ ■ Eligibility

■ ■ ■ Travel time

Entitlement to overtime compensation by federal employees while in a travel status under 5 U.S.C. § 5542(b)(2)(B)(iv) requires that travel result from an event which could not be scheduled or controlled administratively. Travel performed by an employee to attend an event scheduled and conducted by the employee's agency clearly does not meet this requirement, and the employee may not be paid overtime compensation for that travel.

17

■ Retroactive compensation

■ ■ Interest

Effective December 22, 1987, interest on back pay claims applies to periods before and after that date and is chargeable to the same appropriations and in the same manner as is the back pay upon which the interest is paid.

41

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest that statement of work in architect-engineer contract was inadequate is untimely when not filed within 10 working days of the date protester received a draft copy of the contract in preparation for price negotiations.

35

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

To the extent that protester contends that Small Business Administration (SBA) regulation in effect superseded provision in invitation for bids (IFB) requiring that bidder perform at least 50 percent of the cost of manufacturing the supplies called for by the IFB, protester was required to raise the issue before bid opening, since inconsistency between SBA regulation and IFB provision was apparent from the IFB.

20

Competitive Negotiation

- Contract awards
- ■ Administrative discretion
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Award to higher priced, higher technically rated offeror is not objectionable where the solicitation award criteria made technical considerations more important than price, and the agency reasonably concluded that the awardee's superior proposal provided the best overall value.

6

- Offers
- ■ Cost realism
- ■ ■ Evaluation
- ■ ■ ■ Administrative discretion

Protest that agency improperly awarded time and materials/labor hour contract to firm offering allegedly "below cost" labor hour rate is denied where record shows that agency considered reasonableness and realism of proposed rate and offers an adequate explanation for the admittedly low rate.

25

■ Technical evaluation boards

■ ■ Conflicts of interest

■ ■ ■ Corrective actions

Contracting agency's action in convening a second technical evaluation panel was reasonable where the agency considered the chairperson of the first panel to have a potential appearance of conflict of interest because of the individual's prior working relationship with the chief executive officer of the protester.

6

Payment/Discharge

■ Unauthorized contracts

■ ■ Quantum meruit/valebant doctrine

A claim against the Army, arising from its continued use of rental automated data processing equipment and services for nearly a year after the applicable contract had expired, may be paid on a *quantum meruit/quantum valebant* basis. However, since the equipment and services at issue could have been procured under a non-mandatory General Services Administration (GSA) Federal Supply Schedule, the amount of the claim is reduced to that which would have been paid had the items been properly procured under the relevant schedule.

13

Sealed Bidding

■ Bid guarantees

■ ■ Waiver

Requirement for bid, performance and payment bonds can be waived for firms submitting bids through the Canadian Commercial Corporation (CCC) since the Canadian government, pursuant to a letter of agreement with the United States, guarantees all commitments, obligations, and covenants of the CCC in connection with any contract or order issued to the CCC by any contracting activity of the U.S. government.

23

■ Bids

■ ■ Errors

■ ■ ■ Error substantiation

Although contracting agency improperly allowed upward correction of bid to include additional profit, bond costs and insurance costs when the costs were not adequately substantiated, there is no evidence of fraud, bad faith or mutual mistake, the resulting contract was not plainly or palpably illegal, and the contractor may be paid at the contract price where the agency determines that it is not in the government's best interest to terminate the contract.

30

- Bids
- ■ Responsiveness
- ■ ■ Acceptance time periods
- ■ ■ ■ Deviation

Bid was properly rejected as nonresponsive where in "Period for Acceptance of Bids" clause and cover letter attached to bid it was stated that bid was for acceptance within 30 days, whereas "Minimum Bid Acceptance Period" clause also included in solicitation required a 60-day bid acceptance period; IFB was not rendered ambiguous by inappropriate inclusion of "Period for Acceptance of Bids" clause since, reading solicitation as a whole, space provided in the clause for an acceptance period different than 60 days clearly meant a period longer than 60 days.

27

- Bonds
- ■ Justification
- ■ ■ GAO review

Bonding requirements in an invitation for bids for equipment used for the replenishment of supplies and the refueling of ships at sea are not unduly restrictive of competition where the agency experienced a significant percentage of defaults in prior procurements resulting in severe consequences to the Navy mission.

22

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgment
- ■ ■ ■ Responsiveness

A bidder's failure to acknowledge with its bid a material amendment to an invitation for bids renders the bid nonresponsive.

31

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgment
- ■ ■ ■ Responsiveness

A bidder's intention and commitment to perform in accordance with the terms of a material amendment is determined from the acknowledgment of such amendment or constructively from the bid itself, not from the bidder's past performance under a prior contract. Where a bid does not include an essential requirement which appears only in the amendment, there is no constructive acknowledgment of the amendment.

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Procurement

- Invitations for bids
- ■ Amendments
- ■ ■ Materiality

An amendment which incorporates into an invitation for bids for lease of a parking lot an additional requirement of minimum operating hours is material since it imposes a legal obligation on the contractor that was not contained in the original solicitation and therefore changes the legal relationship between the parties.

31

Socio-Economic Policies

- Small businesses
- ■ Contract awards
- ■ ■ Size status
- ■ ■ ■ Misrepresentation

Protest of reopening of discussions with original offerors that remained in the competitive range is denied where agency terminated award to the protester under small business set-aside due to Small Business Administration's final determination that protester was other than small since conducting a new procurement in such circumstances is not required.

44

- Small businesses
- ■ Preferred products/services
- ■ ■ Certification

Requirement that bidder under a small business set-aside procurement for supplies perform at least 50 percent of the cost of manufacturing the supplies is a material term of the solicitation and bid which took exception to that requirement by indicating that 100 percent of manufacturing would be subcontracted thus properly was rejected as nonresponsive.

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- Small businesses
- ■ Responsibility
- ■ ■ Competency certification
- ■ ■ ■ GAO review

The General Accounting Office will not question a contracting agency's determination that a small business concern is nonresponsible, or the agency's subsequent reassessment of new information regarding the concern's responsibility, where, following the agency's referral of the nonresponsibility determination to the Small Business Administration (SBA), the protester fails to apply to the SBA for a certificate of competency despite urging by the contracting agency that it do so.

1

Special Procurement Methods/Categories

■ Architect/engineering services

■ ■ Contractors

■ ■ ■ Price negotiation

■ ■ ■ ■ Termination

Protest that after accepting the price breakdown in protester's proposal the contracting agency reversed its decision to protester's prejudice because protester would not have proceeded with further negotiations if it had known the breakdown was unacceptable is denied since at the time the agency did not have complete pricing data and the protester should have been aware that negotiations would be terminated if no agreement could be reached.

35

■ Architect/engineering services

■ ■ Contractors

■ ■ ■ Price negotiation

■ ■ ■ ■ Termination

Protest that in procuring architect-engineer services under the Brooks Act contracting agency improperly terminated negotiations with protester is denied where record clearly shows that agency and protester could not come to a mutually acceptable agreement.

34

■ In-house performance

■ ■ Evaluation criteria

■ ■ ■ Cost estimates

Protest of determination to perform trash pickup service and operation of a construction debris landfill in-house rather than by contract is denied where the protester has not shown that the agency's prorated allocation of certain government equipment operating costs, as adjusted under an administrative appeal, was inaccurate or violated Office of Management and Budget Circular A-76 procedures for determining the cost of in-house operation versus contracting.

46

■ Research/development contracts

■ ■ Contract awards

■ ■ ■ Foreign sources

Agency did not violate statutory prohibition against contracting with foreign corporations for research and development where proposal of United States firm, while found acceptable, was not evaluated as essentially equal from a technical standpoint to successful proposal of foreign firm.

3

Specifications

■ **Minimum needs standards**

■ ■ **Competitive restrictions**

■ ■ ■ **Sureties**

■ ■ ■ ■ **Financial information**

Solicitation provision which requires offerors providing individual sureties to submit a certified public accountant's certified balance sheet(s) and income statement(s) with a signed opinion for each surety is not legally objectionable as unduly restrictive of competition where the accuracy of sureties' net worths is often called into question by offerors' failure to submit sufficient supporting information.

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